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Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 818)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 55

UNITED STATES, APPELLANT,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED MARCH 11, 1960

PROBABLE JURISDICTION NOTED MAY 23, 1960

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Exhibit No. 70—Cover and table 4 from a study entitled "A Comprehensive Study of College and University Endowment Funds at June 30, 1957"	3086	2682
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Exhibit No. 147—Extract from report to the Bonus and Salary Committee from Alfred P. Sloan, Jr., "Employees' Saving—Stock Purchase Program", July 12, 1955	3115	2705
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Exhibit No. 149—Table classifying General Motors stockholders by size of holdings	3118	2707
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Exhibit No. 179—Defendant du Pont's answer to interrogatories dated December 23, 1958	3154	2752
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Exhibit No. 293—Table showing offerings of common stock of industrial corporations in amounts over $25 million during the seven-year period 1951-1957 and percentage changes in market price of stock and Standard & Poor's Stock Price Index both prior and subsequent to offerings; with reference to new issues, the per cent increase in stock outstanding; with reference to secondary distributions, the per cent of stock outstanding	3198	2792

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Exhibit No. 563—A study conducted for Covington & Burling, Washington, D. C. by National Analysts, Inc., Philadelphia, Pennsylvania	3321	2896
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[fol. 1] [Caption omitted]

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IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 49 C 1071

UNITED STATES OF AMERICA, Plaintiff,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY; GENERAL MOTOR CORPORATION; United States Rubber Company; Christiana Securities Company; Delaware Realty & Investment Corporation; Pierre S. Du Pont; Lammot du Pont; Irene du Pont, Defendants.

MINUTE ENTRY OF FILING OF ORIGINAL COMPLAINT—
June 30, 1949

Be It Remembered, that on to wit, the 30th day of June, 1949, the above entitled action was commenced by the filing of the complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division.

[fol. 4] Filed Jul 18 1957 at — o'clock —. Roy H. Johnson, Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

UNITED STATES OF AMERICA, Appellant,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY et al.

No. 3—

JUDGMENT—June 3, 1957 (Filed in U.S. District Court July 18, 1957)

Appeal from the United States District Court for the Northern District of Illinois.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute in conformity with the opinion of this Court. The motion of the appellees Christiana Securities Company and Delaware Realty and Investment Company for dismissal of the appeal as to them is denied. They are retained as parties pending determination by the District Court of the relief to be granted.

June 3, 1957

Dissenting opinion by Mr. Justice Burton with whom Mr. Justice Frankfurter joins.

Mr. Justice Clark, Mr. Justice Harlan, and Mr. Justice Whittaker took no part in the consideration or decision of this case.

A true copy John T. Fry, Teste Clerk of the Supreme Court of the United States. By P. J. Blanchard, *Deputy.*

July 16, 1957.

[fol. 4A] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1071

UNITED STATES OF AMERICA, Plaintiff,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY; GENERAL MOTORS CORPORATION; United States Rubber Company; Christiana Securities Company; Delaware Realty & Investment Corporation, Pierre S. du Pont, Irenee du Pont, et al., Defendants.

Transcript of Pre-Trial Proceedings of September 25, 1957 re Proposed Plans for Decree

Transcript of proceedings of a post trial conference held in the above-mentioned cause before the HONORABLE WALTER J. LABUY, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois, on the 25th day of September, 1957, at 10:30 a.m.

APPEARANCES

PRESENT:

Mr. Earl A. Jinkinson, Chief, Midwest Office, Antitrust Division; Mr. George D. Reycraft, Assistant Chief, General Litigation Section, Washington, D. C. On behalf of [fol. 4B] the Government; Sidley, Austin, Burgess & Smith, by Mr. George Ragland, Jr. On behalf of the Defendants: Pierre S. du Pont, Irenee du Pont, Christiana Securities Company, Delaware Realty & Investment Corporation, and E. I. duPont de Nemours and Company;

Covington & Burling, by Mr. Hr h B. Cox, Mr. John Lord O'Brian, Mr. Charles A. Horsky, Mr. Daniel M. Gribbon, 701 Union Trust Bldg., Washington, D. C. On behalf of the Defendant E. I. du Pont de Nemours and Company;

Root, Ballantine, Harlan, Bushby & Plamer, by Mr. Philip C. Scott, Mr. Leonard Joseph, 31 Nassau Street, New York, New York. On behalf of the Defendants: Pierre S. du Pont, Irenee du Pont, Christiana Securities Company, and Delaware Realty & Investment Corporation;

Mayer, Meyer, Austrian & Platt, by Mr. Leo F. Tierney; and Mr. Henry M. Hogan and Mr. Robert A. Nitschke, General Motors Building, Detroit 2, Michigan. On behalf of the Defendant General Motors Corporation.

[fol. 4C] The Clerk: No. 49 C 1071, United States vs. E. I. du Pont de Nemours and Company, et al., pre-trial conference.

OPENING REMARKS OF COURT

The Court: Counsel may be seated.

I recognize many old familiar faces in the courtroom this morning. Although this reunion was entirely unexpected, I assure counsel that you are all welcome to be back here again.

Before calling on counsel, I would like to make a few observations. The purpose of this conference is to discuss informally a plan of procedure to be followed in solving the final phase of this case. The Court should fix a time within which counsel on both sides shall submit their respective plans.

The mandate of the Supreme Court vests this Court with a broad discretion and a great responsibility of determining, after further hearings, the form of order to be entered in the case.

In formulating your respective plans, I would urge you to be mindful of this Court's duty to frame a decree that will protect the public interest in a manner least disturbing to the economy, and least harmful to the litigants and to the stockholders of the corporations involved.

[fol. 4D] I observe that the outcome of this litigation could have far-reaching consequences affecting the market and the value of du Pont and General Motors securities in the hands of many, many thousands of investors. These investors are not represented here. They are not parties to this litigation.

It is in the interest of the public welfare that the Court be fully informed of all aspects of the case. Therefore the Court has decided to appoint amicus curiae to protect the interests of the stockholders of du Pont and General Motors corporations, and it would be their duty to offer plans, to study the various plans proposed by the litigants and to make recommendations.

The Court reserves to itself the exclusive right of final

determination. The amicus curiae should not be partisan. Accordingly, counsel employed by any of the litigants in this case are disqualified to act.

The Court appoints Andrew J. Dallstream to act as amicus curiae for the du Pont stockholders, and Manuel E. Cowen to represent the stockholders of General Motors Corporation, who will be asked to prepare proper orders.

Now, the Court would like to hear from counsel on both sides as to what they would recommend that we might accomplish at this conference, and what our plan of pro- [fol. 4E] cedure should be. That is the final end with which these proposed plans should be submitted, as well as the date for the hearings. I presume evidence will be offered on both sides.

The Court will first call on Mr. Jinkinson, who represents the Government.

Mr. Jinkinson: Your Honor, if I am permitted, I will defer to Mr. Reycraft.

The Court: Mr. Reycraft, the Court will hear from you.

STATEMENT FOR UNITED STATES BY MR. REYCRAFT

Mr. Reycraft: May it please the Court, the Government's position with respect to further proceedings in this case can be stated very briefly. I should like first, however, to review for the Court the general nature of the discussions which have been held between counsel for the Government and for du Pont. The discussions have been directed towards arriving at relief measures which both du Pont and the Government could recommend to the Court. To date the discussions have not included counsel for Christiana Securities and Delaware Realty, nor have they included counsel for General Motors. At this stage of the discussions it seemed appropriate to explore first with du Pont the possibilities of agreement. [fol. 4F] The Government has received a proposal from du Pont——

The Court: Will you speak a little louder, please? There is some noise upstairs.

Mr. Reycraft: The Government has received a proposal from du Pont which would include disenfranchising the General Motors stock held by du Pont, restricting du Pont's representation on the board of directors of Gen-

eral Motors, and permitting du Pont-held stock of General Motors to be voted on important stockholder issues with permission of the Court.

The Government has advised du Pont counsel that it believes this proposal to be inadequate. The Government, in turn, has proposed that any judgment include divestiture by du Pont of the General Motors stock which it owns.

We understand that this proposal is presently under consideration by the du Pont Company. The Government's proposal avoided setting forth in detail the manner in which the proposed divestiture should be accomplished.

In view of the many factors to be considered the Government would prefer to have du Pont's views on the matter before recommending a specific program. However, the Government is prepared, if the Court should [fol. 4G] prefer it, or if du Pont counsel feel that further discussions are not profitable, to submit a plan within the very near future at the Court's discretion, within a very brief preiod of time.

The Court: How much time would you suggest?

Mr. Reycraft: Thirty days, sir.

The Court: Well, I would like to hear from counsel for the defense. Mr. Cox?

[fol. 4H] STATEMENT FOR DU PONT BY MR. COX

Mr. Cox: May it please the Court, I think that our disposition, subject to your Honor's wishes, would be to have the Government, if it will, submit a proposed form of judgment within whatever period of time the Government would like to have, and that then we should like to have a period of time thereafter in which to submit comments on their plan, and an alternative plan which we are prepared to submit.

We feel that both sides can do your Honor the most service if we do submit fairly detailed plans, which is what we would propose to do.

The Government, as Mr. Reycraft said, takes the position that some form of disposition of this stock is required. We don't agree with him about that. We think that the measure is along the line that we have hitherto suggested,

which is in effect divestiture of everything except substantially the right to receive dividends, satisfies the mandate of the Supreme Court, and will avoid injury to the public interest and to the stockholders, which your Honor mentioned.

But what I should like to say now with respect to the details of these plans is simply this, your Honor: That as you have indicated, the practical problems involved here are really enormous. There has been no antitrust case, [fol. 41] to my knowledge, where such a large block of property has been involved, and where the problems involved have been so complicated or so fraught with possible consequences to the economy and to a very large body of stockholders.

It seems to me in that situation you cannot decide, really, or the Court would find it difficult to decide what should be done, without help from counsel on how it should be done. So for that reason I hope if the Government does come forward with a proposed judgment it will state its plans in some detail so that we will have issues which we can meet with our objections on any hearing that may occur, because to say that the stock should be disposed of without more is to ignore the real problem. We think when these problems are considered it will become apparent that our proposal more nearly fits the standard established by the Supreme Court and by the other decisions in this field.

Now, as to time, your Honor, in view of the complexity of the problems which we have been working on since last summer, and in view of the fact that we have a large number of persons who have to be consulted about this, after the lawyers have reached their conclusions, persons both in the two companies involved, and the others principally [fol. 42] concerned, we should like, if it is agreeable to your Honor, to have sixty days after we receive the Government's plan, in which to file our plan and comments and objections to the Government's plan.

We feel that we will need that time in view of the complexity of the problems and the necessity we have of consulting the Board of Directors and the executives of the companies involved.

I think as far as the date of the hearing is concerned,

that largely, as far as we are concerned, rests in your Honor's convenience. We would assume it would be some period of time after our objections and alternative plan are submitted, will be required for the Government to examine those. They may want to file comments on our comments, and we would have no objection to that. But so far as the hearing is concerned, we are prepared to leave that to your Honor's convenience.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I think Mr. Cox's suggestion that the Government's plan be sufficiently comprehensive, is a constructive suggestion, and I hope you will follow it.

My thought on the question of the time for reply and for the Government's response thereto, if they wish, should [fol. 4K] be ample. If you file your plan within thirty days, and the defendants' reply within sixty days thereafter—and do you want time to——

Mr. Jinkinson: I think we should have thirty days, your Honor.

The Court: So that would be thirty, sixty, and thirty, and then the Court, of course, would have to study these plans, and I think the best plan would be to notify counsel later, after the Court has completed its study, of the date for the hearings.

Mr. Cox: Your Honor, may I raise one question?

The Court: Yes.

Mr. Cox: I just raise the question, without making any particular suggestion. Will the recommendations and plans of the amicus curiae be fitted into this schedule in some way, or how will that be handled?

The Court: Well, I would suggest that they be given the same time; that, I think, would fit right in with the schedule. In other words, they would have the sixty days, the same as counsel for the defendants should have. I think that would be fair.

Mr. Tierney, would you like to be heard?

STATEMENT FOR GENERAL MOTORS BY MR. TIERNEY

Mr. Tierney: I would like to make an observation. I appear here with Mr. Hogan as counsel for General Motors, [fol. 4L] and while I understand from the decision of the

Supreme Court, following your Honor's findings, that General Motors has been exonerated, we do have, as your Honor has indicated you also have, a very deep continuing concern about the affect of any decree in this case upon the many stockholders of General Motors Corporation, many of whom were stockholders without the least suspicion of anything of this kind would ever come before a court for decision, and we would like to participate in these proceedings, your Honor, to the extent that stockholders shall not be penalized for having done no wrong, and with your Honor's permission we would like from time to time to have all of the documents, the exchange of plans, of the immediate parties, and to be permitted to make our comments.

The Court: Well, your client is still a defendant in the case.

Mr. Tierney: We have not moved yet for dismissal; your Honor.

The Court: Does anybody else wish to be heard?

Mr. Hogan, do you wish to be heard?

Mr. Hogan: No, your Honor, Mr. Tierney spoke for us.

The Court: Does anybody else wish to be heard here this morning?

[fol. 4M] Mr. Scott: I have nothing further.

The Court: If not, then the hearing is concluded until further notice.

Mr. Cox: Do you wish an order prepared, Judge LaBuy, of any kind?

The Court: I think not. The minute order will suffice.

[fols. 4N-5] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ORDER APPOINTING AMICI CURIAE AND FIXING TIME FOR FILLING PLANS FOR COMPLIANCE—Sept. 25, 1957

This matter having come on for pre-trial hearing pursuant to the order entered by this Court on September 11, 1957, copies of which were mailed by the Clerk to all counsel of record, and the Court, having reviewed the status of the proceedings before it, determines that it is in the interest of the public welfare that the Court be fully in-[fol. 7] formed of all aspects of the case and particularly with respect to the effect which the plan or program finally worked out by this Court will have upon the public interest and upon the interest of the stockholders generally of both E. I. du Pont de Nemours and Company and General Motors Corporation. Accordingly, the Court has decided to appoint amici curiae to protect the interests of the stockholders of E. I. du Pont de Nemours and Company and of General Motors Corporation, and it will be their duty to offer plans, to make such reasonable investigation of the situation as is proper to enable them so to do and to study the various plans proposed by the litigants and to make their recommendations to the Court, the Court however reserving to itself the exclusive right of final determination.

And the Court being fully advised in the premises, and all parties having been fully heard, orders, adjudges and decrees as follows:

1. Andrew J. Dallstream is hereby appointed to act as amicus curiae with respect to the interests of the stockholders of E. I. du Pont de Nemours and Company and Manuel [fols. 8-9] E. Cowen is hereby appointed to act as amicus curiae with respect to the interests of the stockholders of General Motors Corporation and amici curiae are directed to perform the duties above enumerated.

2. Plaintiff shall file with the Clerk of this Court a proposed comprehensive plan of compliance within thirty days from the date of this Order, or on or before October 25, 1957; defendants and amici curiae shall file and serve any suggested plan or plans or comments within sixty

days thereafter, or on or before December 24, 1957; plaintiff shall file and serve any reply within thirty days thereafter, or on or before January 23, 1958; and the Court shall thereafter set a date for further proceedings in this cause and notify all counsel and amici curiae of the date set.

Enter:

s/ Walter J. La Buy, District Judge.

[fol. 10] [File endorsement omitted]

[Title omitted]

In United States District Court, Northern District of Illinois, Eastern Division

Final Judgment Proposed by United States—Filed Oct. 25, 1957

Plaintiff United States of America having filed its amended complaint in this action on July 28, 1952; the defendants E. I. du Pont de Nemours and Company, General Motors Corporation, Christiana Securities Company, and Delaware Realty & Investment Corporation, having filed their several answers denying the substantive allegations thereof; the Court after trial having entered an opinion containing its findings of fact and conclusions of law on December 3, 1954 and having entered an order on December 9, 1954 dismissing the action as to these parties; the United States having appealed to the Supreme Court from such decision; the Supreme Court of the United States having reversed so much of the decision as held there was no violation of Section 7 of the Clayton Act on the part of du Pont and the Supreme Court in view of this determina-
[fol. 11] tion having decided not to pass upon the Government's appeal from the dismissal of the action under Sections 1 and 2 of the Sherman Act, and having denied the motion of defendants Christiana and Delaware for a dismissal of the appeal as to them, and having remanded the cause to this Court for further proceedings in conformity with its opinion dated June 3, 1957; and this Court having held hearings as to the equitable relief necessary and

appropriate in the public interest to eliminate the effects of the acquisition of General Motors stock by du Pont,

Now therefore, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I

The order of December 9, 1954 dismissing the complaint charging violations by du Pont of Section 7 of the Clayton Act is hereby vacated; the Court has jurisdiction of the subject matter hereof and of the defendants du Pont, Christiana, Delaware and General Motors and in conformity with the mandate of the Supreme Court it is adjudicated that the acquisition of General Motors stock by du Pont constitutes a violation of Section 7 of the Clayton Act.

II.

As used in this Final Judgment:

(A) "Du Pont" means defendant E. I. du Pont de Nemours and Company; "General Motors" means defendant General Motors Corporation; "Christiana" means defendant Christiana Securities Company; and "Delaware" [fol. 12] means defendant Delaware Realty & Investment Corporation.

(B) "General Motors stock" means voting stock of any class presently outstanding or hereafter issued by General Motors.

(C) "Du Pont stockholder" means any holder of du Pont common stock.

(D) "Trustee" means the person or persons appointed by the Court under separate order in connection with this proceeding and authorized by such order to hold and to dispose of, pursuant to the terms of this Final Judgment, and such other orders from time to time entered by this Court, the General Motors stock which has heretofore been held by the defendants du Pont, Christiana, and Delaware.

(E) "Proportionate share" means the number of shares of General Motors stock allocable to each du Pont stockholder as determined by the proportion which the total number of shares of General Motors stock held by du Pont bears to the total number of shares of du Pont common stock outstanding, multiplied by the number of shares held by each du Pont stockholder.

(F) "Fractional share" means that part of a full share of General Motors stock to which any distributee becomes entitled under the terms of this Final Judgment.

(G) "Pro rata dividends" means the amount of any dividends, to be paid by General Motors to the trustee on the General Motors stock held by him, which is allocable [fol. 13] each year to du Pont stockholders, according to the proportion which the total number of shares of General Motors stock held by the trustee bears to the total amount of dividends received by him from General Motors on such stock, less necessary expenses of distribution.

III

The defendants du Pont, Christiana, and Delaware are ordered and directed, within 60 days of the date of entry of this Final Judgment, to convey to trustee certificates representing all of the General Motors stock held by such defendants at the time of the entry of this Final Judgment. Said trustee shall thereafter hold such stock, subject to the provisions of this Final Judgment. The defendants du Pont, Christiana and Delaware, shall, from time to time as may be necessary for the purpose of this Final Judgment, give the trustee full information concerning the names and addresses of their stockholders and the number of shares held by each of such stockholders.

IV

Defendant General Motors shall pay to the trustee all cash and other dividends declared by General Motors and due and payable with respect to the General Motors stock held by such trustee. The trustee shall pay to du Pont, Christiana, and Delaware, the pro rata dividends allocable to the stock conveyed by them to the trustee, and which remains unsold or undistributed at the time such dividends are declared.

[fol. 14]

V

During the ten-year period required to effect the stock distribution directed in Article VI hereof, and within a reasonable time prior to any regular or special meeting of stockholders of General Motors, the trustee is directed to deliver to each du Pont stockholder of record who is

entitled to receive a stock distribution of one or more shares of General Motors stock a notice of such meeting and the trustee shall execute and deliver a proxy authorizing said stockholder, with the usual power of substitution, to exercise the sole voting power of the proportionate shares of General Motors stock allocable to each share of du Pont stock, and a proxy to vote a pro rated amount of the General Motors stock deposited by Christiana and Delaware with the trustee which is at such time undistributed and unsold.

VI

Beginning 90 days after the date of entry of this Final Judgment and on each anniversary date thereafter, for a total of ten years, the trustee shall distribute to holders of du Pont common stock, other than Christiana, Delaware and the stockholders of Delaware, one-tenth of the proportionate shares of General Motors stock. As to the proportionate shares allocable to Christiana, Delaware and the stockholders of Delaware, the trustee shall dispose of such shares in accordance with Article VII hereof.

[fol. 15] With respect to the fractional shares of General Motors stock which may become payable in the course of each annual distribution, each distributee shall be given an option to receive in cash the value of any fractional share based on the market value of General Motors stock as of the date of distribution, or to receive a full share of General Motors stock by paying in cash the difference between the market value of the fractional share and the market value of a full share as of the date of distribution. In the event that the number of shares required to fulfill the requirements of the election permitted under this Article VI exceeds the total number of shares of stock designated for distribution, the trustee shall fill the requirement from the stock to be distributed under Article VII.

VII

Du Pont is further ordered and directed to give to each of its common stockholders of record, other than defendants Christiana, Delaware and the stockholders of Delaware, on each annual distribution date for a period of ten years, an option to purchase a pro rated share of the General Motors stock held by the trustee allocable to Chris-

tiana, Delaware and the stockholders of Delaware, and the General Motors stock deposited by Christiana and Delaware with the trustee required to be sold during that year.

The trustee is directed to sell at public or private sale any of the shares of General Motors stock allocable to Chris- [fol. 16] tiana, Delaware and the stockholders of Delaware, and the General Motors stock deposited by Christiana and Delaware with the trustee, with respect to which the options to purchase are not exercised by du Pont common stockholders. Such sale shall be made within one year after the date of expiration of such options and the net proceeds paid to Christiana, Delaware and the stockholders of Delaware, according to their beneficial interests. If in the judgment of the trustee reasonable market conditions do not prevail over an appreciable and adequate portion of this one-year period the trustee may petition the Court for an order extending this time for such additional part of the ten-year period as the Court may direct. In addition to such other circumstances as may be relevant, reasonable market conditions shall not be deemed to exist if the price which can be realized at the time by the trustee is not sufficiently high to reflect the fair value and true worth of the stock.

The trustee may, at his own discretion, accelerate the time schedule for the sale of the shares of General Motors stock allocable to Christiana, Delaware and the stockholders of Delaware, and the General Motors stock deposited by Christiana and Deleware with the trustee, by selling in any one year such additional shares of General Motors stock as he may determine can be disposed of at a fair price.

VIII

The defendants du Pont, Christiana, and Delaware are enjoined from acquiring or holding, directly or indirectly, any General Motors stock or from exercising or attempting [fol. 17] to exercise any control or influence over General Motors in any manner whatsoever.

IX

Du Pont and General Motors are ordered to terminate and cancel each and every contract, agreement, or understanding presently existing between them which provides

(1) that General Motors purchase any specified percentage of its requirements of any product from du Pont, (2) that either defendant grant to the other any exclusive patent rights, or (3) that General Motors grant to du Pont either the first or a preferential right to manufacture or sell any chemical discovery made by General Motors, and du Pont and General Motors are hereby enjoined from entering into any such contracts, agreements or understandings.

The defendants General Motors and du Pont are enjoined from entering into or continuing any agreement, understanding, or arrangement or joint ownership or operation of any commercial or manufacturing enterprise, or from knowingly holding stock in any such enterprise at the same time.

X

General Motors is enjoined from having as a director or officer any director, or officer, of du Pont, Christiana, or Delaware.

Du Pont, Christiana, and Delaware are enjoined from having as a director or officer of either du Pont, Christiana, or Delaware, any director or officer of General Motors.

[fol. 18]

XI

The trustee is ordered and directed to submit reports to the Court, to the Attorney General, and to du Pont, General Motors, Christiana and Delaware, for each three-month period beginning with the date of entry of this Final Judgment setting forth (a) the total amount of the stock sold during each period, (b) the total amount of stock sold up to date of the report, (c) the price received therefor, (d) the amount of any commission or brokerage fee paid to any person in connection with such sales, and (e) the names of any persons to whom 50,000 shares or more were sold

XII

For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reason-

able notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during the office hours of said defendant, to those books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant which relate to any matter contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of the defendant, who may have counsel present, regarding any such matters.

[fols. 19-20] Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, said defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of ths Final Judgment.

No information obtained by the means permitted in this Article shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XIII

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment or the trustee appointed hereunder to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XIV

This Final Judgment shall become effective at time of entry.

Dated: ——, ——.

——, United States District Judge.

[fol. 21] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ORDER DIRECTING THAT RULING BE OBTAINED AS TO FEDERAL INCOME TAX CONSEQUENCES OF PLAINTIFF'S PROPOSED JUDGMENT—November 21, 1957

This cause coming on to be heard on the separate motions of Andrew J. Dallstream and Manuel E. Cowen, amici curiae herein, for an order directing that a ruling be obtained as to the Federal income tax consequences of effectuating plaintiff's proposed final judgment filed herein on October 25, 1957, and that the provision of the Court's order of September 25, 1957 for filing of comments and proposals by the amici curiae be modified, and the Court having heard the arguments of counsel and being fully advised in the premises, it is hereby ordered that:

1. Plaintiff, defendants, and amici curiae are hereby directed to proceed with all due expedition to request and obtain a ruling of the Commissioner of Internal Revenue [fols. 22-23] as to the income tax consequences of effectuating plaintiff's proposed final judgment filed herein on October 25, 1957. All parties are directed to cooperate in preparation and prosecution of the request to assure that all relevant factual and statistical data are made available to the Commissioner of Internal Revenue. A copy of the request for ruling shall be filed with the Court.

2. Paragraph 2 of the order entered herein on September 25, 1957 is amended so that amici curiae shall not be required to file and serve any suggested plan or plans or comments on or before December 24, 1957, but shall be required to do so within forty-five days after defendants shall have filed and served their suggested plans or comments. The plaintiff shall have thirty days after all of the proposals and comments of the defendants and amici curiae have been filed, within which to file its reply and comments with respect thereto.

Enter:

s/ Walter J. LaBuy, United States District Judge.

November 21, 1957.

[fols. 24-59] [File endorsement omitted]

[fol. 60] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

PROPOSED JUDGMENT BY DU PONT—Filed May 14, 1958

At Chicago, Illinois, in said Division and District on ——, 1958

Plaintiff having filed its complaint herein on June 30, 1949, and its amendments thereto on July 28, 1952 and January 16, 1953; all of the defendants having appeared and severally filed their answers to the amended complaint denying the substantive allegations thereof; this Court, on January 16, 1953, before the conclusion of the presentation of the plaintiff's case, having entered an order dismissing with prejudice the amended complaint as to certain individual defendants, and on Feburary 16, 1953, at the close of the plaintiff's case, having entered an order dismissing without prejudice the amended complaint as to certain additional individual defendants, and on December 9, 1954, after trial, having entered a judgment herein dismissing this action as to all defendants; the plaintiff having appealed in certain respects from such judgment insofar as it applies to defendants E. I. du Pont de Nemours and Company, General Motors Corporation, Christiana [fol. 61] Securities Company and Delaware Realty and Investment Company; the Supreme Court of the United States having reversed so much of such judgment as held there was no violation of Section 7 of the Clayton Act by defendant E. I. du Pont de Nemours and Company, and having remanded this cause to this Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects offensive to the Clayton Act; this Court having held further hearings pursuant to the decision of the Supreme Court of the United States and having issued findings of fact on —— ——, ——; and defendants Christiana Securities Company and Delaware Realty and Investment Company having consented to the respective provisions of this Judgment relating to them but not to any material modification of such provisions;

Now, therefore, it is hereby Ordered, Adjudged and Decreed as follows:

I

For the purposes of this Judgment:

A. "Du Pont" means defendant E. I. du Pont de Nemours and Company; "General Motors" means defendant General Motors Corporation; "Christiana" means defendant Christiana Securities Company; "Delaware" means defendant Delaware Realty and Investment Company.

B. "General Motors stock" means shares of General Motors of any class having voting rights, including all such shares which reflect adjustments in the capital structure of General Motors by way of stock dividends, stock splits, recapitalization or otherwise, but does not include rights to acquire General Motors stock.

C. "Du Pont stock" means shares of du Pont common stock of any class having voting rights, including all such shares which reflect adjustments in the capital structure of [fol. 62] du Pont by way of stock dividends, stock splits, recapitalization or otherwise, but does not include rights to acquire du Pont stock.

D. "Du Pont stockholder" means any holder of record of du Pont stock; "Christiana stockholder" means any holder of record of Christiana common stock; "Delaware stockholder" means any holder of record of Delaware capital stock.

II

The Judgment of December 9, 1954 of this Court dismissing the amended complaint is hereby vacated insofar as it adjudges du Pont not to have violated Section 7 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes," commonly known as the Clayton Act. In conformity with the mandate of the Supreme Court of the United States it is hereby adjudicated that, at the time of suit, there was a reasonable probability that the acquisition by du Pont of General Motors stock was likely to create in du Pont a monopoly of General Motors purchases of automotive fabrics and finishes in violation of Section 7 of the Clayton Act.

III

Du Pont is hereby enjoined and restrained, so long as it holds any General Motors stock, from having as a director, officer, or employee any person who is at the same time an officer or employee of General Motors. No person who is a director, officer, or employee of du Pont may serve as a director of General Motors without the approval of this Court; any such person who is so authorized shall not, as a director of General Motors, participate in the consideration of or vote upon any matter involving trade or commerce between General Motors and du Pont.

[fol. 63]

IV

Du Pont is hereby enjoined and restrained from acquiring, directly or indirectly, any General Motors stock except such stock as may be distributed with respect to the General Motors stock held by it, or as may be acquired by the exercise of rights issued with respect to such stock.

V

A. Du Pont is hereby enjoined and restrained, as hereafter provided in this Section V, from exercising the voting rights of any General Motors stock.

B. The voting rights of the General Motors stock held by du Pont shall be exercised, in the manner provided in Paragraph D(3) of this Section V, by the du Pont, Christiana and Delaware stockholders, as of the record date for the determination of General Motors stockholders entitled to notice of and to vote at a General Motors annual or special meeting, except that Christiana and Delaware shall not be entitled to exercise the voting rights of any of the General Motors stock held by du Pont.

C. The number of shares of General Motors stock held by du Pont to be voted by each du Pont, Christiana and Delaware stockholder shall be determined, as of the record date for the determination of General Motors stockholders entitled to notice of and to vote at a General Motors annual or special meeting, as follows:

(1) The number of shares of General Motors stock held by du Pont at such date shall be divided by the number of shares representing all du Pont stock out-

standing and enfitled to vote at such date, and each du Pont stockholder shall be entitled to vote the number of shares determined by multiplying the quotient by the number of shares of du Pont stock owned of record by such stockholder at such date.

[fol. 64] (2) The number of shares of General Motors stock which each Christiana stockholder shall be entitled to vote shall be determined by dividing the number of such shares which Christiana, but for Paragraph B above, would be entitled to vote as a du Pont stockholder at such date by the number of shares representing all Christiana common stock outstanding and entitled to vote at such date, and multiplying the quotient by the number of shares representing Christiana common stock owned of record by such Christiana stockholder at such date.

(3) The number of shares of General Motors stock which each Delaware stockholder shall be entitled to vote, shall be determined by dividing the number of such shares which Delaware, but for Paragraph B above, would be entitled to vote as a Christiana stockholder and as a du Pont stockholder, at such date, by the number of shares representing all capital stock of Delaware outstanding and entitled to vote at such date, and multiplying the quotient by the number of shares representing capital stock of Delaware owned of record by such Delaware stockholder at such date.

D. The following steps shall be taken prior to each annual or special meeting of General Motors stockholders:

(1) Promptly after the record date for the determination of General Motors stockholders entitled to notice of and to vote at the said meeting, du Pont, Christiana and Delaware shall each deliver to General Motors, and Christiana and Delaware shall deliver to du Pont, a properly certified statement showing (a) a list of its stockholders as of that record date who are entitled to vote the General Motors stock held of record by du Pont, showing the name of each such stockholder, his address, and the number of shares of each class of its voting stock which he holds, and (b) the quotients determined in accordance with Paragraph C above.

[fol. 65] (2) Du Pont shall execute such instruments and take such other steps as may be necessary to authorize each such stockholder to vote at the said meeting of the stockholders of General Motors, in the manner hereinafter provided in Paragraph D (3) of this Section V, the number of shares of General Motors stock held by du Pont as determined for each such stockholder in accordance with Paragraph C above, and du Pont shall furnish to General Motors evidence of such authorization in form satisfactory to General Motors.

(3) Du Pont shall arrange to furnish to each such stockholder a copy of the Notice of Meeting, Proxy Statement, proxy or proxies and other proxy soliciting material in the same manner and in the same form prepared by General Motors for distribution to its stockholders in connection with said meeting, except that each proxy will be signed by du Pont for use by each such stockholder when countersigned by him, and will represent such number of General Motors shares as are determined for each such stockholder in accordance with Paragraph C above; shall arrange to inform each such stockholder of the approximate number of shares of General Motors stock which the holder of each share of du Pont, Christiana and Delaware stock is entitled to vote as such proxy holder; and shall see that each such stockholder is notfied of his right, in accordance with this Section V of this Judgment, to vote as such proxy holder.

(4) Du Pont shall also arrange to furnish each such stockholder, at or prior to the time it furnishes the proxy soliciting material for each annual meeting of the stockholders of General Motors, a copy of the latest Annual Report of General Motors.

E. The provisions of this Section V shall not apply with respect to any annual or special meeting of General Motors [fol. 66] held within 180 days from the effective date of this Judgment.

VI

Du Pont shall be authorized at any time, or from time to time, to sell or otherwise dispose of all or any part of

the General Motors stock held by it; provided, however, that each sale or other disposition must first be approved by this Court after reasonable notice to the Attorney General.

VII

In the event that Christiana or Delaware or both shall become the holder of any General Motors stock held by du Pont or shall acquire any General Motors stock through the exercise of rights issued with respect to such stock, Christiana and Delaware are hereby enjoined and restrained from exercising the voting rights of all or any part of said stock at any annual or special meeting of the stockholders of General Motors, and are hereby directed to make such arrangements and to take such steps as may be necessary to insure that so long as either continues to hold any such General Motors stock the voting rights of the said stock shall be exercised by the Christiana and Delaware stockholders substantially in accordance with the procedure contained in Paragraph D of Section V of this Judgment.

VIII

Du Pont shall report in writing annually to this Court the actions taken in compliance with the provisions of this Judgment and shall serve copies of such reports upon all parties hereto.

IX

The expenses incurred by General Motors in carrying out the provisions of this Judgment shall, when approved by this Court, be paid by du Pont; provided, however, that Christiana and Delaware, respectively, shall pay the ex- [fol. 67] penses incurred in connection with the transmissions and notifications to Christiana and Delaware stockholders.

X

For the purpose of securing compliance with this Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall be permitted, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on

reasonable notice as to time and subject matter to du Pont, Christiana or Delaware at their respective principal offices, (1) to inspect during office hours all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of du Pont, Christiana or Delaware relating to any provisions of this Judgment, during which time counsel for du Pont, Christiana, or Delaware, as the case may be, may be present; and (2) subject to the reasonable convenience of du Pont, Christiana or Delaware and without restraint or interference from them, to interview regarding any such provisions any officer or employee of du Pont, Christiana or Delaware, who, together with du Pont, Christiana, or Delaware, as the case may be, may have counsel present. No information obtained by means provided in this Section X of this Judgment shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Judgment or as otherwise required by law.

XI

Jurisdiction is retained for the purpose of enabling any party hereto to apply to this Court at any time for such further orders and directions as may be necessary or [fols. 68-202] appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof, or for the enforcement of compliance therewith and punishment of any violations thereof; provided, however, that nothing contained in this Section XI of this Judgment shall preclude Christiana or Delaware from asserting that no further relief can be granted against them, or any one of them, without their respective consents.

XII

The effective date of this Judgment shall be 12:01 A.M. ——— ———.

——— ———, Judge of the United States District Court.

[fol. 203] [File endorsement omitted]

[fol. 204] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title Omitted]

OBJECTIONS OF GENERAL MOTORS CORPORATION TO FINAL JUDGMENT PROPOSED BY THE UNITED STATES OF AMERICA —Filed June 6, 1958

General Motors Corporation, by its attorney, Leo F. Tierney, objects to the entry of a judgment and decree in this case in the form proposed by the United States of America because such judgment and decree would require duPont to divest itself of its General Motors stock and would have the following consequences:

1. It would cause an immediate, substantial and prolonged decline in the market value of General Motors stock.

2. It would cause an immediate and substantial decline in the market value of duPont stock, which would occur even prior to any distribution or sale of duPont's General Motors stock.

[fol. 205] 3. The losses occasioned by the decline in market value of General Motors stock would directly affect all of the more than 700,000 stockholders of General Motors, including 500,000 or more who hold less than 200 shares apiece, and including over 32,000 trusts, estates and custodians for minors, more than 1,000 churches and religious organizations, over 1,000 charitable and benevolent organizations and hundreds of insurance companies, college and university endowment funds, libraries, museums and the like. The losses occasioned by the decline in market value of duPont stock would directly affect all of the more than 200,000 stockholders of duPont, including almost 13,000 trusts and estates, over 1,700 charitable organizations and college and university endowment funds and hundreds of insurance companies. Trustees of trust estates, which own almost 1 percent of duPont's out-

standing stock, will face serious problems in allocating the dividends in General Motors stock and the taxes thereon as between income beneficiaries and remaindermen; and the beneficiaries of small trusts, who depend upon the income from such trusts for their living, will be seriously hurt by the decline in income and asset value caused by the plan.

4. College and university endowment funds and charitable institutions own large amounts of stock in Christiana. Despite their tax free status, those educational and charitable institutions will suffer serious losses in the value of their Christiana holdings as a result of: (1) the capital gains taxes payable in connection with the forced sales of the General Motors stock attributable to Christiana, and (2) the income taxes payable upon the distributions to Christiana. [fol. 206] They will also suffer serious losses in the income from their Christiana holdings because of the depletion resulting from the taxable sales of the General Motors stock, both that owned by Christiana and that owned by duPont and attributable to Christiana as a duPont stockholder.

5. The substantial declines in the market values of General Motors and duPont stock will cause similar declines in other automotive and chemical stocks, with consequent losses to the stockholders of those companies; and in addition will affect unfavorably the entire stock market.

6. Because of the tremendous volumes of General Motors stock hanging over the market during the ten year period of divestiture, General Motors and the other automotive manufacturers will find it difficult to raise equity capital except at excessive cost to the companies and their stockholders. Coupled with the depressed stock prices caused by the plan, the impaired ability of an important industry like automotive to raise equity capital may well have a serious impact upon the general business activity.

In addition to the foregoing objections, General Motors Corporation objects to the following specific points in the

form of judgment and decree proposed by the United States of America:

1. Sections IV, V, IX, X and XII of the decree would order or direct General Motors to do or to refrain from doing certain specified things, as if General Motors were still a defendant in this case. The judgment of this Court, dismissing all charges against General Motors, was not reversed by the Supreme Court, and hence General Motors is not a defendant [fol. 207] in this case subject to this Court's injunctive powers, but remains a party only for the protection of its interests. Moreover, what General Motors would be ordered to do is contrary to corporate law and to good corporate practice. More specifically:

(a) Section IV would require General Motors to pay dividends to someone other than the stockholders of record.

(b) Section V would require General Motors to recognize proxies executed by persons who are neither stockholders of record nor beneficial owners, and makes no provision for the persons receiving the voting rights to receive General Motors proxy statements and the General Motors annual report.

(c) Section IX would require General Motors to cancel certain contracts with duPont and would enjoin General Motors from entering into certain other contracts with duPont, even though such contracts might otherwise be perfectly lawful and even though they have no relationship to duPont's violation of Section 7 of the Clayton Act.

(d) Section X would require General Motors to dismiss any officer or director who also was or became an officer or director of duPont, Christiana or Delaware.

(e) Section XII would require General Motors to permit representatives of the Department of Justice access to its files and records and would require General Motors to make reports upon request of the Attorney General (or his representative).

[fol. 208] 2. Section I would vacate the entire dismissal order of December 9, 1954, instead of just so much thereof as adjudged duPont not to have violated Section 7 of the Clayton Act.

3. The proposed judgment does not define all of the powers and duties of the Trustee (Section II *et seq.*).

4. Section V would sterilize the voting rights of approximately 21 million outstanding shares of General Motors stock, for no provision has been made for the voting of the shares owned by duPont and allocable to Christiana, Delaware and the stockholders of Delaware as stockholders of duPont.

5. The requirements of the Government's proposed decree would create innumerable practical problems for General Motors in the maintenance and administration of its records of stockholders, in the handling of voting rights and proxies and in the distribution of dividends, stock warrants and other rights. Particularly would that be so if, as might well happen, the Trustee were to distribute or sell a large amount of stock at a time coincident with the record date for a General Motors stockholders meeting or for the distribution of a dividend to General Motors stockholders. The administrative burdens and expenses thus imposed upon General Motors are inequitable and unwarranted, particularly in view of the fact that General Motors has been exonerated of all charges of illegality.

For all of the reasons set forth herein, General Motors states that the judgment and decree proposed by the United States of America would not be "in the public interest," as required by the mandate, and that its entry would be to the prejudice and detriment of persons who were not par-[fols. 209-210] ties to this cause or who, as in the case of General Motors, were found not to have violated the law. General Motors, therefore, objects to the entry of said proposed judgment and decree.

General Motors Corporation, By Leo F. Tierney, Its Attorney.

Of Counsel: Henry M. Hogan, Robert A. Nitschke, Bryson P. Burnham, Mayer, Friedlich, Spiess, Tierney, Brown & Platt.

[fols. 211-342] [File endorsement omitted]

[fol. 343] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

PROPOSED JUDGMENT BY ANDREW J. DALLSTREAM, AMICUS CURIAE—Filed August 7, 1958

At Chicago, Illinois, in said Division and District on —— —, 1958.

Plaintiff having filed its complaint herein on June 30, 1949, and its amendments thereto on July 28, 1952 and January 16, 1953; all of the defendants having appeared and severally filed their answers to the amended complaint denying the substantive allegations thereof; this Court, on January 16, 1953, before the conclusion of the presentation of the plaintiff's case, having entered an order dismissing with prejudice the amended complaint as to certain individual defendants, and on February 16, 1953, at the close of the plaintiff's case, having entered an order dismissing without prejudice the amended complaint as to certain additional individual defendants, and on December 9, 1954, after trial, having entered a judgment herein dismissing this action as to all defendants; the plaintiff having appealed in certain respects from such judgment insofar as [fol. 344] it applies to defendants E. I. du Pont de Nemours and Company, General Motors Corporation, Christiana Securities Company and Delaware Realty and Investment Company; the Supreme Court of the United States having reversed so much of such judgment as held there was no violation of Section 7 of the Clayton Act by defendant E. I. du Pont de Nemours and Company, and having remanded this cause to this Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects offensive to the Clayton Act; this Court having held further hearings pursuant to the decision of the Supreme Court of the United States and having issued findings of fact on —— —, ——; the Internal Revenue Service having ruled on —— —, —— as to the Federal income tax consequences of carrying out the provisions of this Judgment

including, among other things, a ruling that no income will be recognized to the stockholders of defendant E. I. du Pont de Nemours and Company as a consequence of the provisions of Article VIII of this Judgment except to such stockholders whose applications for a distribution of General Motors shares pursuant to the provisions of said Article are approved, and that each such stockholder will be regarded as having received a distribution of property as a dividend only at the effective date of such distribution and only to the extent that such distribution is approved;

Now, therefore, it is hereby Ordered, Adjudged and Decreed as follows:

I

For the purposes of this Judgment:

(a) "Du Pont" means defendant E. I. du Pont de Nemours and Company; "General Motors" means defend-[fol. 345] ant General Motors Corporation; "Christiana" means defendant Christiana Securities Company; "Delaware" means defendant Delaware Realty and Investment Company.

(b) "General Motors stock" means shares of General Motors of any class having voting rights, including all such shares which reflect adjustments in the capital structure of General Motors by way of stock dividends, stock splits, recapitalization or otherwise, but does not include rights to acquire General Motors stock.

(c) "Du Pont Common" means shares of du Pont common stock of any class having voting rights, including all such shares which reflect adjustments in the capital structure of du Pont by way of stock dividends, stock splits, recapitalization or otherwise, but does not include (i) rights to acquire du Pont Common, or (ii) Du Pont Special Common to be issued as provided for in Article VIII of this Judgment.

(d) "Du Pont Special Common" means shares of the new class of du Pont common stock, however in fact denominated, to be issued as provided for in Article VIII of this Judgment, including all such shares which reflect adjustments in the capital structure of du Pont by way of stock dividends, stock sprits, recapitalization or otherwise, but

does not include rights to acquire du Pont Special Common.

(e) "Holder of du Pont Common" and "holder of du Pont Special Common" mean any holder of record of du Pont Common and du Pont Special Common, respectively; "Christiana stockholder" means any holder of record of Christiana common stock; "Delaware stockholder" means any holder of record of Delaware capital stock.

(f) "General Motors shares reserved for general corporate purposes" means the General Motors stock reserved [fol. 346] by du Pont in accordance with the first sentence of Paragraph (a) of Article VIII of this Judgment.

(g) "General Motors shares allocated for take-downs" means the General Motors stock made available for distribution to holders of Common in accordance with the second sentence of Paragraph (a) and Paragraph (d) of Article VIII of this Judgment.

(h) "Substituted assets allocated for take-downs" means the substituted assets referred to in Paragraph (c)(2) of Article VIII of this Judgment.

(i) "General Motors income" means du Pont's net income from General Motors shares (and/or substituted assets) allocated for take-downs, as reflected in the separate accounts established pursuant to Paragraph (b) of Article VIII of this Judgment.

(j) "Pass-through voting rights on General Motors shares" shall mean voting rights on General Motors shares exercisable by stockholders of du Pont, Christiana and Delaware under the provisions of Article IV of this Judgment.

II

The Judgment of December 9, 1954 of this Court dismissing the amended complaint is hereby vacated insofar as it adjudges du Pont not to have violated Section 7 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes," commonly known as the Clayton Act. In conformity with the mandate of the Supreme Court of the United States it is hereby adjudicated that, at the time of suit, there was a reasonable probability that the acquisition by du Pont of General Motors stock was likely to create in du Pont a monopoly

[fol. 347] in the line of commerce consisting of automotive fabrics and finishes in violation of Section 7 of the Clayton Act.

III

(a) Du Pont, Christiana and Delaware are each hereby enjoined and restrained from exercising voting rights, or soliciting any other person in any manner with respect to exercising voting rights, directly or indirectly, on General Motors stock, by whomsoever owned of record or beneficially, and including pass-through voting rights on General Motors stock; provided, however, that nothing in this paragraph shall prevent du Pont, Christiana or Delaware from performing acts required to be performed by them in connection with the passing through of voting rights to their stockholders pursuant to Article IV.

(b) No person who—

(i) is a director or officer of du Pont, Christiana or Delaware, or is a spouse or relative living in the same house with any such person, or

(ii) is employed by du Pont and is regularly and directly engaged in selling automotive finishes or fabrics to General Motors,

shall exercise pass-through voting rights on General Motors stock, shall exercise any authority or power to direct any other person with respect to exercising such voting rights, or shall solicit any other person in any manner with respect to exercising such voting rights, directly or indirectly. Nothing herein contained shall prevent any party or person from applying to the Court for permission for any or all of the persons specified in (i) or (ii) above to exercise such voting rights in respect of particular corporate matters (such as charter amendments and authorization of securities) not involving elections, compensation of personnel or transactions between General Motors and du Pont.

[fol. 348]

IV

All voting rights on General Motors stock which, except for Paragraph (a) of Article III, would be exercisable by du Pont, Christiana or Delaware shall be passed through to their respective stockholders in accordance with the fol-

lowing Paragraphs (a) to (d) inclusive of this Article. In the case of Christiana and Delaware, this requirement shall apply to all voting rights on shares of General Motors stock directly held by either of them and also to voting rights passed through to either of them as stockholders of du Pont and/or Christiana under the provisions hereof. In each case the stockholders entitled to exercise the voting rights hereunder shall be the stockholders of record of the respective corporations as of the record date for determination of General Motors stockholders entitled to notice of and to vote at each annual or special meeting of stockholders of General Motors, subject, however, to the restrictions contained in Article III of this Judgment.

(a) The number of shares of General Motors stock held by du Pont, Christiana and Delaware (if any) to be voted by each du Pont, Christiana and Delaware stockholder shall be determined, as of the record date for the determination of General Motors stockholders entitled to notice of and to vote at a General Motors annual or special meeting, as follows:

(1) The number of shares of General Motors stock allocated for take-downs at such date shall be divided by the number of shares of du Pont Common outstanding and entitled to vote at such date, and each holder of du Pont Common shall be entitled to vote (subject, however, to the provisions of Article III of this Judgment) the number of General Motors shares determined by multiplying the quotient by the number of shares of du Pont Common owned of record by such stockholder at such date.

[fol. 349] (2) The number of shares of General Motors stock reserved for general corporate purposes at such date shall be divided by the total number of shares of du Pont Common and du Pont Special Common outstanding and entitled to vote at such date, and each holder of du Pont Common and/or du Pont Special Common shall be entitled to vote (subject, however, to the provisions of Article III of this Judgment) the number of General Motors shares determined by multiplying the quotient by the total number of shares of du Pont Common and du Pont Special Common owned of record by such holder at such date.

(3) The number of shares of General Motors stock which each Christiana stockholders shall be entitled to vote (subject, however, to the provisions of Article III of this Judgment) shall be determined by dividing the number of such shares (if any) held by record by Christiana plus the number of such shares which Christiana, but for Paragraph (a) of Article III, would be entitled to vote as a du Pont stockholder at such date, by the number of shares representing all Christiana common stock outstanding and entitled to vote at such date, and multiplying the quotient by the number of shares representing Christiana common stock owned of record by such Christiana stockholder at such date.

(4) The number of shares of General Motors stock which each Delaware stockholder shall be entitled to vote (subject, however, to the provisions of Article III of this Judgment) shall be determined by dividing the number of such shares (if any) held of record by Delaware plus the number of such shares which Delaware, but for Paragraph (a) of Article III, would be entitled to vote as a Christiana stockholder and as a du Pont stockholder at such date, by the number of shares representing all capital stock of Delaware outstanding and entitled to vote at such date, and multiplying the quotient by the number of shares representing capital stock of Delaware owned of record by such Delaware stockholder at such date.

[fol. 350] (b) The following steps shall be taken prior to each annual or special meeting of General Motors stockholders:

(1) Promptly after the record date for the determination of General Motors stockholders entitled to notice of and to vote at the said meeting, du Pont, Christiana and Delaware shall deliver to General Motors a properly certified statement setting forth (i) a list of their respective stockholders as of that record date who are entitled to vote the General Motors stock held of record by du Pont, Christiana and/or Delaware, showing the name of each such stockholder, his address, and the number of shares of each class

of their respective voting stocks which he holds, and (ii) the quotients determined in accordance with Paragraph (a) above.

(2) Du Pont, Christiana and Delaware shall each execute such instruments and take such other steps as may be necessary to authorize each such stockholder to vote at the said meeting of the stockholders of General Motors, in the manner hereinafter provided in Paragraph (b)(3) of this Article IV, the number of shares of General Motors stock determined for each such stockholder in accordance with Paragraph (a) above, and du Pont, Christiana and Delaware shall each furnish to General Motors evidence of such authorization in form satisfactory to General Motors.

(3) Du Pont, Christiana and Delaware shall each arrange to furnish to each of its stockholders so entitled to vote a copy of the Notice of Meeting, Proxy Statement, proxy or proxies and other proxy soliciting material prepared by General Motors (or by any other person or group of persons making a solicitation under applicable regulations of the Securities and Exchange Commission) for distribution to stockholders of General Motors in connection with said meeting, except that each proxy shall be modified or supplemented in such manner as to empower each such stockholder freely and effectively to vote such number of General [fol. 351] Motors shares as are determined for each such stockholder in accordance with Paragraph (a) above; shall arrange to inform each such stockholder of the number of shares of General Motors stock which the holder of each share of du Pont, Christiana and Delaware stock is entitled to vote as such proxy holder; and shall see that each such stockholder is notified of his right, in accordance with this Article IV, to vote as such proxy holder.

(4) Du Pont, Christiana and Delaware shall each also arrange to furnish each such stockholder, at or prior to the time it furnishes the proxy soliciting material for each annual meeting of the stockholders of General Motors, a copy of the latest Annual Report of General Motors.

(c) The expenses incurred by General Motors in carrying out the provisions of this Judgment shall, when approved by this Court, be paid by du Pont, which may charge a proper proportion thereof to General Motors income; provided, however, that Christiana and Delaware, respectively, shall pay the expenses incurred in connection with the transmissions and notifications to Christiana and Delaware stockholders.

(d) The provisions of this Article IV shall not apply with respect to any annual or special meeting of General Motors held within — days from the effective date of this Judgment.

V

Unless and until du Pont, Christiana and Delaware shall have disposed of the legal and beneficial interest in all General Motors stock—

(a) General Motors is hereby enjoined and restrained from having as a director, officer or employee any person [fol. 352] who is a director, officer or employee of du Pont, Christiana or Delaware;

(b) Du Pont, Christiana and Delaware are each hereby enjoined and restrained from having as a director, officer or employee any person who is a director, officer or employee of General Motors; and

(c) Du Pont, Christiana and Delaware are each hereby enjoined and restrained from nominating any person as a director, officer or employee of General Motors.

VI

(a) Du Pont, Christiana and Delaware are each hereby enjoined and restrained from—

(1) exercising or attempting to exercise any control over General Motors or using or attempting to use its stock ownership in General Motors to influence General Motors in any manner, or

(2) acquring, directly or indirectly, any additional shares of General Motors stock except—

(i) shares that may be distributed by General Motors with respect to outstanding shares already held,

(ii) shares that may be distributed pro rata by du Pont or Christiana to their respective stockholders,

(iii) shares that may be distributed by du Pont or Christiana in redemption of or in exchange for outstanding shares of their own capital stock, or

(iv) shares that may be acquired by Christiana or Delaware, with approval of the Court, pursuant to the provisions of Article VIII of this Judgment.

[fol. 353] (b) If du Pont, Christiana or Delaware shall receive rights to purchase General Motors stock, either directly or (in the case of Christiana or Delaware) by virtue of this Article VI, they are each hereby enjoined and restrained from exercising any such rights, but each of them may in its discretion distribute in whole or in part or sell in whole or in part such rights received by it. In the case of rights applicable to General Motors stock reserved for general corporate purposes, any such distribution by du Pont shall be made pro rata to holders of du Pont Common and holders of du Pont Special Common, and the proceeds of any such sale by du Pont shall be credited to other than General Motors income. In the case of rights applicable to General Motors stock allocated for take-downs, any such distribution by du Pont shall be made pro rata to holders of du Pont Common only, and the proceeds of any such sale by du Pont shall be credited to General Motors income.

VII

(a) Not more than — months from the effective date of this Judgment, du Pont and General Motors shall terminate and cancel any agreement, arrangement or understanding presently in effect between them providing for the purchase by General Motors of any specified percentage of its requirements of automotive finishes or fabrics for a period in excess of one year, or for such longer period as may be necessary to assure General Motors of a supply for models of any specified year; and they are each hereby enjoined and restrained from entering into any such agreement, arrangement or understanding in the future, except with the approval of the Court.

(b) Du Pont is hereby enjoined from seeking preferential treatment in the sale of any product by reason of

du Pont's ownership of General Motors stock; however, [fol. 354] nothing herein shall be deemed otherwise to limit the right of du Pont to endeavor to sell or to sell its products to General Motors.

VIII

Not later than —— after the effective date of this Judgment, du Pont shall complete all necessary steps and arrangements, in accordance with the following paragraphs (a) to (h), inclusive, whereby each du Pont stockholder may apply for and obtain, subject to the conditions hereinafter set forth, part or all of his pro rata share of the General Motors stock now owned by du Pont, other than such portion thereof as may be reserved by du Pont for general corporate purposes as hereinafter provided; and du Pont shall notify this Court, all parties hereto, and each of its stockholders of the date when this Article shall become operative.

(a) Du Pont shall be authorized to designate to be held by it for general corporate purposes not in excess of — shares of General Motors stock and shall be entitled to retain, or, with approval of the Court, to sell or otherwise dispose of, any or all of such shares, but shall not be entitled to exercise the voting rights of any of such shares. The balance of the General Motors stock now held by du Pont shall be allocated for take-downs by du Pont stockholders in accordance with the following paragraphs of this Article. As soon as practicable and not later than —— after the effective date of this Judgment, du Pont shall file with this Court and serve upon all other parties hereto a notification of the number of shares of General Motors stock which it elects to reserve for general corporate purposes pursuant to the first sentence of this Paragraph (a), and the number of shares which will be allocated for take-downs by stockholders pursuant to the second sentence of this Paragraph (a).

[fol. 355] b. Du Pont shall establish and maintain on its books and records separate and independent accounts for the General Motors stock (and/or substituted assets) allocated for take-downs. Said separate accounts shall reflect the segregation of such stock (and/or substituted assets) from other assets of du Pont, and shall reflect separate

and independent income, expenses, taxes and other charges properly allocable thereto.

(c) Du Pont shall take, subject to the applicable laws of the State of Delaware, all necessary and appropriate steps to authorize the creation of a new class of common stock ("du Pont Special Common") which shall have the same rights and limitations as the present du Pont Common except as follows:

(1) The du Pont Special Common shall have no rights or interests in or to and no claims upon any General Motors stock (and/or substituted assets) allocated for take-downs, or in or to or upon General Motors income. In connection with each future declaration and payment of dividends on du Pont Common, the Board of Directors of du Pont shall specify, and shall notify the holders of du Pont Common, as to: (i) the amount per share paid out of General Motors income, and (ii) the amount per share paid out of other sources, and in each instance the latter amount shall be equal to the amount of dividends per share concurrently declared and paid on the du Pont Special Common. In the event of any other distributions on the du Pont Common, in voluntary or involuntary liquidation or otherwise, the Board of Directors shall specify, and shall notify the holders of Common as to: (i) the amount per share representing distribution of General Motors stock (and/or substituted assets) allocated for take-downs and of undistributed General Motors income, if any; and (ii) the amount per share representing distribution of other assets of du Pont, and in each instance the latter amount shall [fol. 356] be equal to the amount per share concurrently distributed on the du Pont Special Common.

(2) No disposition, other than by way of distributions to holders of du Pont Common, of more than 5% of the then amount of General Motors stock (and/or substituted assets) allocated for take-downs shall be made by du Pont except on affirmative vote of holders of at least two-thirds of the shares of du Pont Common outstanding. The proceeds or avails of any sale or exchange shall become "substituted assets" for the benefit of holders of du Pont Common; without

prejudice, however, to legal rights or prior claims of creditors or holders of preferred stocks of du Pont.

(3) No amendment increasing the relative rights of the du Pont Common or decreasing the relative rights of the du Pont Special Common shall be made except on affirmative vote of holders of at least two-thirds of the du Pont Special Common outstanding voting as a class; and no amendment increasing the relative rights of the du Pont Special Common or decreasing the relative rights of the du Pont Common shall be made except on affirmative vote of holders of at least two-thirds of the du Pont Common outstanding voting as a class.

(4) So long as du Pont holds any General Motors stock (and/or substituted assets) allocated for take-downs, du Pont shall not issue any additional shares of du Pont Common except as a stock split or as a stock dividend in respect of outstanding du Pont Common, but it may issue such additional shares of du Pont Special Common, in such manner and for such consideration, as it may determine in its discretion from time to time.

(5) The certificate of incorporation of du Pont as the same shall be amended shall contain such provisions with respect to recapitalizations, stock splits, stock dividends, mergers, consolidations and reorganizations, as the same may affect the du Pont Common and the du Pont Special Common and the rights of the holders thereof, as shall be approved by the Court as fair and [fol. 357] equitable as between the holders of the du Pont Common and the du Pont Special Common and consistent with the provisions of this Article VIII.

(d) Any holder of du Pont Common may apply to du Pont for any part or all of his pro rata share of the General Motors stock (and/or substituted assets) allocated for take-downs, and, if such application is approved and accepted as hereinafter provided, such stockholder shall receive upon surrender and cancellation of his shares of du Pont Common:

(1) One share of du Pont Special Common for each share of du Pont Common surrendered and cancelled; and

(2) The amount of General Motors stock (and/or

substituted assets) allocated for take-downs and of undistributed General Motors income, if any, which is allocable to the share or shares of du Pont Common surrendered and cancelled, provided that, at the option of du Pont, cash or scrip may be paid in lieu of any fraction of a General Motors share (or other securities included among the substituted assets).

(e) Not more than thirty days after the end of each calendar quarter of each year du Pont shall file with this Court a statement in writing showing all pending applications by holders of du Pont Common that have been submitted in accordance with the provisions of this Article VIII of this Judgment, disclosing in the case of each such application the number of shares of du Pont Common tendered, the name of the stockholder making the application, and, if any person specified in Paragraph (b) of Article III is the beneficial owner of such shares or has the power to exercise or to direct the exercise of pass-through voting rights with respect thereto, the name and relationship to the defendants of such person. The said statement shall [fol. 358] be available for inspection by all parties hereto but shall not be disclosed to any other person except pursuant to an order of this Court. Within thirty days after the filing of the said statement, any party hereto may provide this Court with information and recommendations as to the probable economic consequences of the approval of any or all such applications, as to whether acceptance of any or all such applications would be consistent with the purposes and provisions of this Judgment, as to the necessity or appropriateness of imposing conditions on acceptance of any or all such applications, and any other relevant matter. This Court may request or direct any party hereto to submit such additional information as this Court believes relevant.

(f) Upon receipt of the statement and data prescribed in Paragraph (e) above, and after a hearing, if a hearing is deemed necessary, this Court will make findings as to:

(1) the probable economic consequences of the approval of each application,

(2) whether approval of each application would be consistent with the purposes and provisions of this Judgment,

(3) what conditions, if any, should be imposed with respect to exercise of voting rights or otherwise, and

(4) such other factors as may appear relevant at the time each application is considered,

and will direct du Pont to accept applications to the extent, in the amount, in the order, and subject to the conditions, if any, determined by this Court. Du Pont shall notify each applying holder of du Pont Common whether and to what extent this Court has determined that his application should be accepted and shall effect the appropriate distribution to [fol. 359] such holder pursuant to the aforesaid directions of this Court.

(g) As soon as practicable, du Pont shall apply for listing of the du Pont Special Common on a national securities exchange.

(h) Du Pont shall take all necessary and appropriate action to advise holders of du Pont Common of the provisions of this Article VIII, to prescribe the form of and manner in which applications may be made by such stockholders, to establish subject to the approval of this Court the rights of such stockholders pending consideration of their applications, and to effectuate such distributions as are approved by this Court under the terms of this Article VIII.

IX

Du Pont shall be authorized at any time, or from time to time, to sell or otherwise dispose of all or any part of the General Motors stock held by it; provided, however, that each sale or other disposition must first be approved by this Court after reasonable notice to the Attorney General (and in the case of General Motors shares allocated for take-downs, must be authorized by vote of stockholders as and to the extent provided in Paragraph (c)(2) of Article VIII).

X

(a) Within — days of the effective date of this Judgment, each defendant shall furnish a copy of this Judgment to each of its directors and officers and to each of its executives responsible for the execution of any of the provisions hereof; and thereafter, upon the first election or appoint-

ment of any director or officer or any such executive of [fol. 360] any defendant, such defendant shall furnish a copy of this Judgment to him.

(b) Until further order of the Court, every proxy statement or other proxy soliciting material prepared by General Motors in connection with a meeting of its stockholders shall contain an appropriate summary of the provisions of Articles III and IV of this Judgment.

XI

(a) Du Pont, Christiana and Delaware shall each report in writing annually to this Court the actions taken in compliance with the provisions of this Judgment and shall serve copies of such reports upon all parties hereto.

(b) At any time, or from time to time, the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, may make written application to the Court for an order, after due notice and hearing thereon, requiring any defendant to submit in writing such special report or reports with respect to the matters contained in this Judgment as may then be reasonably necessary to the enforcement of this Judgment.

(c) Any of the parties, or either of the amici curiae appointed to represent the interests of du Pont and General Motors stockholders, shall have the right to file with the Court relevant information and recommendations as to any development that would have the effect of eliminating or substantially reducing the tax payable under the present provisions of the Internal Revenue Code by du Pont stockholders upon a distribution to them of General Motors stock. Copies of such report shall be served on all other parties hereto, who shall then be afforded an opportunity to be heard on such report and any recommendations that may be contained therein.

[fol. 361] XII

For the purpose of securing compliance with this Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall be permitted, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on

reasonable notice as to time and subject matter to any defendant at its principal office, (1) to inspect during office hours all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant relating to any provisions of this Judgment, during which time counsel for such defendant may be present; and (2) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview regarding any such provisions any officer or employee of such defendant, who, together with such defendant, may have counsel present. No information obtained by means provided in this Article or Paragraph (b) of Article XI of this Judgment shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Judgment or as otherwise required by law.

XIII

Jurisdiction is retained by this Court for the purpose of enabling any of the parties hereto to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination [fols. 362-373] of this Judgment or of any provision thereof, for the enforcement of compliance therewith and the punishment of any violation thereof, for the supervision of Articles VIII and IX of this Judgment, and for the granting of such further relief as may appear to be necessary or appropriate.

XIV

The effective date of this Judgment shall be 12:01 A.M. ——— —, ———.

———— ————, Judge of the United States District Court.

[fol. 374] IN UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ORDER DIRECTING THAT RULING BE OBTAINED AS TO FEDERAL INCOME TAX CONSEQUENCES OF JUDGMENT PROPOSED BY ANDREW J. DALLSTREAM, AMICUS CURIAE—Aug. 8, 1958

This cause coming on to be heard on the motion of Andrew J. Dallstream, amicus curiae herein, for an order directing that a ruling be obtained as to the Federal income tax consequences of effectuating his Proposed Judgment filed herein on August 7, 1958, and the Court having heard the arguments of counsel and being fully advised in the premises, it is hereby ordered that defendant E. I. du Pont de Nemours and Company and amicus Andrew J. Dallstream are hereby directed to proceed with all due expedition to request and obtain a ruling from the Commissioner of Internal Revenue as to the income tax consequences of effectuating the Proposed Judgment of Andrew J. Dallstream filed herein on August 7, 1958; that all other [fol. 375-376] parties and amicus Manuel E. Cowen are directed to cooperate in the preparation and prosecution of the request to assure that all relevant factual and statistical data are made available to the Commissioner of Internal Revenue; and that a copy of the request for ruling be filed with the Court.

Enter:

s/ J. H. Miner, United States District Judge.

Dated: August 8, 1958.

[fols. 377-458] [File endorsement omitted]

[fol. 459] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

PROPOSED JUDGMENT BY MANUEL E. COWEN, AMICUS CURIAE —Filed Aug. 14, 1958

At Chicago, Illinois, in said Division and District on ——, 1958.

Plaintiff having filed its complaint herein on June 30, 1949, and its amendments thereto on July 28, 1952 and January 16, 1953; all of the defendants having appeared and severally filed their answers to the amended complaint denying the substantive allegations thereof; this Court, on January 16, 1953, before the conclusion of the presentation of the plaintiff's case, having entered an order dismissing with prejudice the amended complaint as to certain individual defendants, and on February 16, 1953, at the close of the plaintiff's case, having entered an order [fol. 460] dismissing without prejudice the amended complaint as to certain additional individual defendants, and on December 9, 1954, after trial, having entered a judgment herein dismissing this action as to all defendants; the plaintiff having appealed in certain respects from such judgment insofar as it applies to defendants E. I. du Pont de Nemours and Company, General Motors Corporation, Christiana Securities Company and Delaware Realty and Investment Company; the Supreme Court of the United States having reversed so much of such judgment as held there was no violation of Section 7 of the Clayton Act by defendant E. I. du Pont de Nemours and Company, and having remanded this cause to this Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects offensive to the Clayton Act; this Court having held further hearings pursuant to the decision of the Supreme Court of the United States and having issued findings of fact on —— —, ——;

Now, therefore, it is hereby Ordered, Adjudged and Decreed as follows:

I

For the purposes of this Judgment:

(a) "du Pont" means E. I. du Pont de Nemours and Company; "General Motors" means General Motors Corporation; "Christiana" means Christiana Securities Company; "Delaware" means Delaware Realty and Investment Company.

(b) "General Motors stock" means shares of General Motors of any class having voting rights, including all such shares which reflect adjustments in the capital structure of General Motors by way of stock dividends, stock splits, recapitalization or otherwise, but does not include rights to acquire General Motors stock.

[fol. 461] (c) "du Pont stock" means shares of du Pont common stock of any class having voting rights, including all such shares which reflect adjustments in the capital structure of du Pont by way of stock dividends, stock splits, recapitalization or otherwise, but does not include rights to acquire General Motors stock.

(d) "du Pont stockholder" means any holder of record of du Pont stock; "Christiana stockholder" means any holder of record of Christiana common stock; "Delaware stockholder" means any holder of record of Delaware capital stock.

II

The Judgment of December 9, 1954 of this Court dismissing the amended complaint is hereby vacated insofar as it adjudges du Pont not to have violated Section 7 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes," commonly known as the Clayton Act. In conformity with the mandate of the Supreme Court of the United States it is hereby adjudicated that, at the time of suit, there was a reasonable probability that the acquisition by du Pont of General Motors stock was likely to create in du Pont a monopoly of automotive fabrics and finishes in violation of Section 7 of the Clayton Act.

III

du Pont, its officers, directors are hereby enjoined from exercising or attempting to exercise any control over General Motors or from using its stock ownership in General Motors for the purpose of securing any preferential treatment by way of contract or otherwise in the sale of automotive fabrics and finishes to General Motors.

[fol. 462]

IV

du Pont, Christiana and Delaware are each hereby enjoined from acquiring, directly or indirectly, any General Motors stock, provided that this paragraph shall not prevent (1) their acceptance of any shares which may be distributed by General Motors with respect to outstanding shares already held, or (2) their election to exercise rights to purchase General Motors stock which are made available on an equal basis to all General Motors stockholders.

V

So long as du Pont, Christiana or Delaware shall own any stock in General Motors, each of said companies is hereby enjoined from having, either as a director or officer or employee, any person who is at the same time a director, officer or employee of General Motors, and from nominating any person as a director of General Motors.

VI

A. As hereinafter in this Sec. VI provided, du Pont and Christiana are hereby enjoined from exercising the voting rights of any General Motors stock. The voting rights of all General Motors stock which they own shall be exercised in the following manner:

(1) As of the record date specified by General Motors for the determination of General Motors stockholders entitled to notice of and to vote at a General Motors annual or special meeting, the following computation shall be made of the relationship between the number of shares of General Motors stock held of record by du Pont and Christiana and the number of

outstanding shares of stock in du Pont, Christiana and Delaware:

(a) The number of shares of General Motors stock [fol. 463] held of record by du Pont at such date shall be divided by the number of shares representing all du Pont stock outstanding and entitled to vote at such date.

(b) The number of shares of General Motors stock which represent the quotient of (a) above, multiplied by the number of shares of du Pont stock held of record by Christiana, plus the number of shares of General Motors stock owned by Christiana, shall be divided by the number of shares representing all Christiana common stock outstanding and entitled to vote at such date.

(c) The number of shares of General Motors stock which represent the quotient of (a) above, multiplied by the number of shares of du Pont stock held of record by Delaware, plus the number of shares of General Motors stock which represent the quotient of (b) above, multiplied by the number of shares of Christiana stock held of record by Delaware, shall be divided by the number of shares representing all capital stock of Delaware outstanding and entitled to vote at such date.

(2) Except as specified in (3) below, each du Pont stockholder shall be entitled to vote as a proxy holder as hereinafter provided in paragraph B of this Sec. VI that number of shares of General Motors stock equal to the quotient of (1)(a), above, multiplied by the number of shares of du Pont stock held of record by such stockholder at the record date specified by General Motors for the determination of General Motors stockholders entitled to notice of and to vote at a General Motors annual or special meeting; each Christiana stockholder shall be entitled to vote as a proxy holder as hereinafter provided in paragraph B of this Sec. VI that number of shares of General Motors stock equal to the quotient of (1)(b) above, multiplied by the number of shares of Christiana common stock held of record by such stockholder at said

[fol. 464] record date specified by General Motors; and each Delaware stockholder shall be entitled to vote as a proxyholder as hereinafter provided in paragraph B of this Sec. VI that number of shares of General Motors stock equal to the quotient of (1) (c) above, multiplied by the number of shares of Delaware capital stock held of record by such stockholder at said record date specified by General Motors.

(3) The following shall not be entitled to exercise the voting rights specified in (2), above:

(a) Christiana;

(b) Delaware;

(c) Any person who on the record date specified by General Motors for the determination of General Motors' stockholders entitled to notice of and to vote at a general Motors annual or special meeting, is an officer or director of duPont, Christiana or Delaware;

(d) The spouse or child in the household of any person included in (c) above;

(e) Any person who, for a period of 10 years prior to the effective date of this decree, has been an officer or director of du Pont, Christiana or Delaware.

(4) Neither du Pont, Christiana and Delaware, nor any person ineligible to vote under (3), above, shall direct or solicit any other person by any means with respect to the manner in which the voting rights specified in (2), above, shall be exercised. Nothing in this paragraph shall prevent du Pont, Christiana, or Delaware from performing acts required to be performed by them in connection with the passing through of voting rights in accordance with Article VI.

B. Prior to each General Motors annual or special meeting the following steps shall be taken:

(1) As soon as possible after the record date for the determination of General Motors stockholders entitled [fol. 465] to notice of and to vote at such meeting, du Pont, Christiana and Delaware shall each deliver to General Motors, and Christiana and Delaware shall each deliver to du Pont, certificates containing (a) a list of its stockholders as of that record date who are

entitled by A(2), above, to vote as a proxy holder the General Motors stock held of record by du Pont and Christiana, excluding those who are ineligible to vote under A(3), above, showing the name and address of each such stockholder and the number of shares of each class of its voting stock which he holds of record, and (b) the quotients determined in accordance with A(1), above.

(2) du Pont and Christiana shall execute such instruments and take such other steps as may be required to authorize each such stockholder to vote as a proxy holder at the said meeting of the stockholders of General Motors in the manner provided in (3), below, the number of shares of General Motors stock held by du Pont and Christiana as determined for each stockholder in accordance with A(2), above, and shall furnish satisfactory evidence to General Motors of such authorizations.

(3) du Pont shall arrange to—

(a) furnish to each such stockholder a copy of the last annual report of General Motors and in addition a copy of the notice of meeting, proxy statement, proxy or proxies and other proxy soliciting material in the same manner and in the same form in which such materials are distributed by General Motors to its own stockholders, in connection with said meeting except that each proxy representing the number of General Motors shares as determined for each such stockholder in accordance with A(2), above, will be signed by du Pont for use by each such stockholder;

[fol. 466] (b) inform each such stockholder of the approximate number of shares of General Motors stock he is entitled to vote as such proxyholder; and

(c) undertake to advise each such stockholder of his right to vote as such proxyholder.

C. In order to insure that the practices and procedures followed by the parties herein shall be consistent with the provisions of this paragraph, the Court will appoint two persons as Special Representatives of the Court who shall report to the Court following each General Motors annual or special meeting, making such recommendations as to changes in procedures for the future as they may believe

desirable. Such persons, or either of them, shall be permitted upon written request, and upon reasonable notice, and subject to any legally recognized privilege, to inspect all records and documents in the possession of du Pont, Christiana or Delaware relating to the carrying out of the provisions of this Article, and to interview any officer or employee of such companies (who may have counsel present) with respect to the methods and procedures used in carrying out the provisions of this Article. In the event any recommendation of the Special Representatives is not concurred in by the parties hereto, the Court, upon the application of any party will determine, after hearing, whether such recommendation should thereafter be made mandatory.

D. The provisions of this Article shall not apply with respect to any annual or special meeting of General Motors held within 180 days of the effective date of this Judgment.

E. The expenses incurred by General Motors in carrying out the provisions of this Article and the expenses of the Special Representatives of the Court as provided in C, above, shall, when approved by the Court, be paid by du Pont; provided, however, that Christiana and Delaware, respectively, shall pay the expenses incurred by General [fol. 467] Motors and/or du Pont in connection with the transmission of the prescribed materials to Christiana and Delaware stockholders.

VII

du Pont may at any time sell or otherwise dispose of all or any part of the General Motors stock held by it, provided, however, that each sale or other disposition must first be approved by the Court after notice to all parties of record, including the *amici*, and to the Attorney General.

VIII

Within 90 days following the effective date of this Judgment, du Pont and General Motors shall cancel and terminate any existing agreement, arrangement or understanding which

(a) provides for the purchase by General Motors of any specified percentage of its requirements of automotive finishes or automotive fabrics,

(b) grants to du Pont exclusive patent rights in any chemical discovery relating to or useful in the field of automotive finishes or automotive fabrics, or

(c) grants to du Pont any first or preferential rights to manufacture or sell any chemical discovery by General Motors in the field of automotive finishes or automotive fabrics.

IX

Du Pont, Christiana and Delaware shall report in writing, annually, to the court, until relieved of this obligation by order of the court, the actions taken in compliance of the provisions of this judgment, except to Article VI, what shall be reported to the court by the Special Representatives, as provided in Article VI(c) hereof.

[fol. 468]

X

Whenever the laws of the United States relating to the income taxes to be imposed on the distribution to du Pont stockholders of the General Motors stock now held by du Pont shall be changed so as to eliminate or substantially reduce the income taxes presently payable in the event of such a distribution, any party hereto, and the *amici curiae* appointed by the Court on September 25, 1957, to represent the stockholders of du Pont and General Motors, may so report to the Court, with recommendations as to the modifications of this Judgment, if any, which should be made. The Court may, in such event, after hearing, modify or eliminate any Article of this Judgment, or add additional Articles.

XI

For the purpose of securing compliance with this Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall be permitted, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice as to time and subject matter to du Pont, Christiana or Delaware at their respective principal offices, (1) to inspect during office hours all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of du Pont,

Christiana or Delaware relating to any provisions of this Judgment, during which time counsel for du Pont, Christiana, or Delaware, as the case may be, may be present; and (2) subject to the reasonable convenience of du Pont, Christiana or Delaware and without restraint or interference from them, to interview regarding any such provisions any officer or employee of du Pont, Christiana or Delaware, [fols. 469-470] who, together with du Pont, Christiana, or Delaware, as the case may be, may have counsel present. No information obtained by means provided in this Section X of this Judgment shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Judgment or as otherwise required by law.

XII

Jurisdiction is retained for the purpose of enabling any party hereto, or the *amici curiae* appointed by the Court on September 25, 1957, to represent the du Pont and General Motors stockholders, or the Special Representatives of the Court appointed by Article VI(c) of this Judgement, to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the application, interpretation, construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof, or for the enforcement of compliance therewith and the punishment of any violations thereof.

XIII

The effective date of this Judgment shall be 12:01 A.M., ——— —, ———.

———, Judge of the United States District Court.

[fol. 471] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION OF UNITED STATES FOR PRELIMINARY INJUNCTION —Filed Sept. 26, 1958

The United States of America, plaintiff, pursuant to Section 15 of the Clayton Act, c. 323, 38 Stat. 736 (1914), as amended, 15 U.S.C. § 25 (1952), moves this Court for the entry of an order, pending final determination of the judgment to be entered in this cause, preliminarily enjoining and restraining:

1. du Pont, Christiana and Delaware from exercising voting rights, or soliciting any other person in any manner with respect to exercising voting rights, directly or indirectly, on General Motors stock, by whomsoever owned of record or beneficially.

2. General Motors from having as a director, officer or employee any person who is a director, officer or employee of du Pont, Christiana or Delaware.

[fol. 472] 3. du Pont, Christiana and Delaware from having as a director, officer or employee any person who is a director, officer or employee of General Motors.

4. du Pont, Christiana and Delaware from nominating any person as a director, officer or employee of General Motors.

5. du Pont, Christiana and Delaware from acquiring, directly or indirectly, any General Motors stock, provided that this injunction shall not prevent (1) their acceptance of any shares which may be distributed by General Motors with respect to outstanding shares already held, or (2) their election to exercise rights to purchase General Motors stock which are made available on an equal basis to all General Motors stockholders.

/s/ George D. Reycraft, Attorney, Department of Justice.

Dated: September 25, 1958.

[fol. 473] [Title omitted]

AFFIDAVIT OF GEORGE D. REYCRAFT IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

CITY OF WASHINGTON,
District of Columbia, ss:

George D. Reycraft, being first duly sworn, on information and belief, deposes and says:

I am an attorney in the Antitrust Division of the Department of Justice assigned to the prosecution of this case. This affidavit is submitted in support of plaintiff's Motion for a Preliminary Injunction, dated September 25, 1958. The motion seeks to restrain defendants from having interlocking corporate personnel and seeks to enjoin defendants du Pont, Christiana and Delaware from voting General Motors stock or from increasing their proportionate equity [fol. 474] interests in General Motors.

Varying final judgment plans have been submitted by the Government, defendant du Pont and amici Dallstream and Cowen. Each of these plans are in substantial accord that minimum requirements of any final judgment must include injunctions against the exercise of voting rights in defendant General Motors and against any increase in the equity percentage of ownership of du Pont, Christiana and Delaware in General Motors.

Mr. Dallstream is of the opinion that the defendants should be enjoined from maintaining interlocking directors, officers or employees and in this conclusion the Government concurs. Mr. Cowen reaches the same result but would have the Court's order directed against only du Pont, Christiana and Delaware. Du Pont would forbid its directors, officers or employees to be officers or employees of General Motors but would permit them to be directors of General Motors with court approval, in which event the director would not vote on matters of trade or commerce between General Motors and du Pont.

In view of the substantial agreement of the parties and amici curiae concerning the minimum relief which is required in this case to eliminate the effects of the acquisition of General Motors stock by du Pont, the Government asks that this minimum relief be granted without further delay.

[fol. 475] General Motors has recently announced that changes of a far reaching nature in the organization of that company have been made. These chan es are reportedly included the selection of a new Chairman of the Board of General Motors who is also to be the chief executive officer of that company. A new President of General Motors has also been appointed by that company's directors.

These changes have been made by a Board of Directors which includes six persons who are at the present time directors of E. I. du Pont de Nemours and Company, and who, it is substantially agreed among the parties in this case and amici curiae, should no longer be permitted to serve in this dual capacity.

The election of these directors was accomplished in large part through the exercise of the voting rights of the unlawfully acquired stock now held by du Pont which all parties are agreed may no longer be exercised by du Pont consistently with the Supreme Court mandate and the provisions of the Clayton Act.

/s/ George D. Reycraft, Attorney, Department of Justice.

Subscribed and sworn to before me this 25th day of September, 1958. Mary Lee De Vall. (Seal.)

[fol. 476] In United States District Court, Northern District of Illinois, Eastern Division

[Title omitted]

Notice of Motion for Preliminary Injunction

To: Dewey, Ballantine, Bushby, Palmer & Wood, 40 Wall Street, New York 5, New York, Attorneys for defendant E. I. du Pont de Nemours & Co.

Covington & Burling, 701 Union Trust Building, Washington, D. C., Attorneys for defendants Christiana Securities Company and Delaware Realty & Investment Corporation.

Mayer, Friedlich, Spiess, Tierney, Brown & Platt, 231 South La Salle Street, Chicago 4, Illinois, Attorneys for defendant General Motors Corporation.

Please take notice that the undersigned will bring the attached motion for a preliminary injunction on for hearing before this Court at Room Number 677, United States Court House, Chicago, Illinois, on further notice to all parties.

/s/ George D. Reycraft, Attorney, Department of Justice.

Dated: September 25, 1958.

[fols. 477-478] cc: Andrew J. Dallstream, amicus curiae, 231 South La Salle Street, Chicago 4, Illinois; Manuel E. Cowen, amicus curiae, 1 La Salle Street Building, Chicago 2, Illinois.

[fol. 479] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION FOR ORDER DIRECTING AMICUS CURIAE DALLSTREAM TO MAKE AVAILABLE TO ALL PARTIES THE RESULTS OF HIS INVESTIGATION—Filed Sept. 26, 1958

The United States of America, plaintiff, pursuant to Sec. 15 of the Clayton Act, c. 323, 38 Stat., 736 (1914) as amended, 15 U.S.C. § 25 (1952), moves this Court for the entry of an order directing Andrew J. Dallstream to make available to all parties in this case:

1. All correspondence with Counsel and "other interested persons" in this case. (p. 2 Dallstream report)

2. All "correspondence with stockholders and representatives of stockholders who have written to make inquiries or suggestions." (p. 2 Dallstream report)

3. Minutes or summaries of all meetings with "stockholders and representatives of stockholders of du Pont." (p. 2 Dallstream report)

[fols. 480-481] 4. All plans proposed or submitted by any person for consideration in this case, or considered by amicus Dallstream from any source.

5. All analyses of lists of stockholders of General Motors, du Pont, Christiana and Delaware.

6. All studies made or submitted by any person with reference to any issue in this case, other than the work product of an attorney, which have been considered in the formulation of his recommendations.

s/ George D. Reycraft, Attorney, Department of Justice.

Dated: September 25, 1958.

[fol. 482] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION FOR ORDER DIRECTING AMICUS CURIAE COWEN TO MAKE AVAILABLE TO ALL PARTIES THE RESULTS OF HIS INVESTIGATION—Filed Sept. 26, 1958

The United States of America, plaintiff, pursuant to Sec. 15 of the Clayton Act, c. 323, 38 Stat., 736 (1914) as amended, 15 U.S.C. § 25 (1952), moves this Court for the entry of an order directing Manuel E. Cowen to make available to all parties in this case:

1. All correspondence with counsel and other interested persons in this case.

2. All correspondence with stockholders and representatives of stockholders who have written to make inquiries or suggestions.

3. All analyses of lists of stockholders of General Motors, du Pont, Christiana and Delaware.

[fols. 483-484] 4. All "market reports and analyses concerning market sales over the last 10 years, reports of financial analyses and economists concerning the stock of duPont and General Motors, and concerning the market generally, balance sheets, and financial statements, numerous detailed analyses of sales of the stock of General Motors, duPont, and Ford Motor Corporation and other

corporations, and . . . reports concerning the effect upon the market of previous sales of large blocks of stock" which have been considered in the formulation of his recommendations. (p. 2 Cowen report)

5. Minutes or summaries of all meetings "with numerous large stockholders, whose holdings range from 50,000 shares to upwards of 1,000,000 shares each of General Motors stock." (p. 3 Cowen report)

6. Opinions of economists, financial and economic authorities considered in the formulation of his report. (p. 3 Cowen report)

7. All plans proposed or submitted by any person for consideration in this case, or considered by amicus Cowen from any source.

8. All studies made or submitted by any person with reference to any issue in this case, other than the work product of an attorney, which have been considered in the formulation of his recommendations.

/s/ George D. Reycraft, Attorney, Department of Justice.

Dated: September 25, 1958.

[fol. 485] In United States District Court

Excerpts from Memorandum in Support of Government's Proposed Final Judgment—Filed Sept. 26, 1958

IV

Alternative Methods of Complying With Divestiture Requirement of Clayton Act

The Clayton Act leaves open the question whether the unlawfully acquired stock may be left in the hands of stockholders of the acquiring company or whether the required divestiture contemplates a disposition on the open market. In a situation involving a closely held corporation it would, of course, be self-defeating to transfer the unlawfully acquired stock from the acquiring company to its stockholders. The Act condemns certain stock acquisitions whether they are made "directly or indirectly." It follows

that retention of the unlawfully acquired stock by indirect means would not satisfy the divestiture requirement of the statute. On the other hand, a widely held corporation with diversified control may meet the statutory requirement by distributing the stock among its dispersed stockholders. This Court's finding of control of duPont management through Christiana and Delaware makes it plain that defendant duPont does not meet this test. Distribution of the unlawfully acquired stock without recognition of this basic fact would result in direct control of the largest portion of the unlawfully acquired stock by this group and indirect control of General Motors by duPont.

The Supreme Court in retaining Christiana and Delaware as parties recognized this essential consideration. Defendants Christiana and Delaware acknowledge on page 6 of their brief that they have been retained so that, "in the event of an order requiring distribution of duPont's [fol. 486] General Motors holdings to the duPont stockholders, the District Court could consider the necessity of a provision precluding these defendants from acquiring their pro rata shares of the distributed stock." Inasmuch as Christiana and Delaware themselves have had no trade relations with General Motors, their retention could not be required for any lesser purpose. The elimination of interlocking directorates between them and General Motors could readily be accomplished by enjoining General Motors from having as a director any of their directors, officers or employees.

A. The Government's Proposed Final Judgment

The Government's proposed final judgment distinguishes between the group which would exercise indirect control of General Motors in the event of a distribution and the general stockholders of duPont. The reasons for this distinction are set forth in Section III above.

A ten-year period has been proposed as a reasonable period of time within which to accomplish the distribution and sale. Although the Government's proposed final judgment asks that ten per cent of the stock be sold and distributed in each year the Government would have no objection to any reasonable variation of this schedule within the ten-year period. Moreover, in the event that the proposed

financial advisors should deem it desirable, a further extension to twenty years would be possible.

[fol. 487] Among the variations possible under the Government's general form of judgment would be the option to distribute all of the General Motors stock other than that allocable to Christiana, Delaware and the stockholders of Delaware in a single year. As pointed out in Mr. Cowen's memorandum [25] this would result in a non-taxable return of that part of the stock which exceeded the accumulated earnings and profits of duPont. To the extent that the duPont company has accumulated earnings and profits this amount would be taxable as ordinary income under the provisions of the Internal Revenue Code applicable to all companies making such distributions.

To the extent that the dividend represents a return of capital, or, in other words, exceeds earnings and profits, it is not taxed. This is the answer to the argument that the taxation of any part of the distribution of General Motors stock is a capital levy. Where there is in fact a return of capital the Internal Revenue Code does not impose a tax.

In proposing that annual distributions be made over a ten-year period it was the Government's purpose to provide the defendants with the maximum reasonable time period within which to work out the details of their compliance with Section 11 of the Clayton Act. The Government would, of course, prefer that the distribution be accomplished within the shortest possible time. There would, accordingly, be no objection by the Government to a distribution within one year to permit treatment of the greater part of the [fol. 488] dividend as a non-taxable return of capital as Mr. Cowen's memorandum indicates might be preferable.

A distribution within one year need not affect the sale of General Motors stock allocable to Christiana, Delaware and the stockholders of Delaware over a ten-year period. As Mr. Dallstream's alternative proposal suggests, two classes of stock can be created to accomplish this objective.

A further advantage to a distribution within one year is that such a distribution could be completed prior to the sale of any of the General Motors stock thus eliminating all question with respect to the alleged market impact

[25] p. 18

of the distribution. In fact, a one-year distribution, since it would exceed earnings and profits and thereby reduce the basis to the distributee for capital gains purposes, would substantially reduce the incentive of the distributee to sell any of the General Motors stock.

B. Dissolution of Christiana and Delaware

Should Christiana and Delaware be dissolved the amount of stock to be sold could be sharply reduced. The basis in the record of this case for the dissolution of Christiana and Delaware may be found in the following finding of this Court:

> . . . the duPont family had voting control of Christiana and Delaware whose duPont stock is consistenly voted as a block in favor of duPont management, coupled with the fact that for many years members of the duPont family have been major executives of the corporation, indicates control of management of duPont by the duPont family.[26]

[fol. 489] Transfer of sufficient unlawfully acquired General Motors stock from du Pont to the Christiana--Delaware group would, as discussed above, effect no substantial change in the existing situation.

Dissolution of Christiana and Delaware coupled with restrictions on the voting rights of the General Motors stock allocable to former stockholders of Christiana and Delaware could, on the other hand, provide a basis for a judgment sharply limiting the amount of stock to be sold. Such a judgment might include:

1. A court order requiring that Christiana and Delaware be eliminated as holding companies either by dissolution or merger into duPont.

2. Distribution of all duPont-held General Motors stock on a pro rata basis during the ten-year period.

3. Restriction of the voting rights on all General Motors stock distributed to present stockholders of Christiana and Delaware, other than institutional stockholders.

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[26] 126 F. Supp. 235, 239.

DuPont common stock accounts for approximately 98.5% of Christiana's assets. The advantage of purchasing Christiana stock have been pointed out in a study prepared by Francis I. duPont & Co. The following excerpt from that study indicates the extent of that stock's undervaluation:

> . . . with each share of Christiana common representing indirect ownership of about 80 shares of duPont, and with Christiana common selling at the price of roughly 68 shares of duPont, the buyer of Christiana common will be in line for a higher yield than the [fol. 490] buyer of duPont so long as all Christiana's expenses a common share do not exceed the dividends on the approximate 12 shares of duPont which the buyer of Christiana in effect receives "for nothing."

Analyzing this relationship with respect to a possible dissolution of Christiana, Francis I. duPont & Co. then stated:[27]

> In the event of dissolution of Christiana Securities Company, which presumably would be effected by pro rata distribution of assets, the purchaser of Christiana common would receive roughly 12 more duPont shares than he paid for.

Table III of this memorandum, prepared by Francis I. duPont & Co., illustrates the extent to which Christiana has been underpriced for many years. Accordingly, on dissolution, its stockholders would receive substantial benefits.

Inasmuch as Christiana now pays an intercorporate dividend tax on dividends received the stockholders of Christiana are in fact doubly disadvantaged by its continued existence. Over the past ten years Christiana has paid intercorporate dividend taxes of $43,378,328. Table IV attached hereto graphically portrays these tax consequences.

The intercorporate dividend taxes paid by Delaware are indicated by Table V and amounted to $17,570,000 since 1948.

Christiana, while held by approximately 4000 stockholders

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[27] "Christiana Securities Company—'duPont at a discount,'" Francis I. duPont & Co., 1952.

does not qualify as a regulated investment company under the provisions of Section 851 (b)(4)(A)(ii) of the Internal [fol. 491] Revenue Code for the reason that its assets are concenfrated in duPont stock.[28] Its dissolution could nevertheless be accomplished without tax-incidence by merging Christiana into duPont under the provisions of Section 354, Internal Revenue Code.

Delaware is not publicly traded, but its shares are worth approximately $950,000,000 or $1200 per share. It could also be merged into duPont without imposition of Federal income tax under Section 354 of the Code.

If Christiana and Delaware chose to dissolve, stockholders would be required to pay an income tax on accumulated earnings and profits—for Christiana a tax on about $500 a share and for Delaware a correspondingly lower figure. Christiana stockholders would be required to pay a small capital gains tax on the General Motors 1955 stock dividend shares in addition. Dissolution or merger of these holding companies would be essential to a distribution of the General Motors stock in a manner which would be consistent with the objectives of the Clayton Act, and which would sharply reduce the amount of stock to be sold. [fol. 492] The assets held by Christiana are:

	Shares	Market Value
duPont common stock	12,199,200	$2,452,039,200
General Motors common stock	535,500	23,829,750
Wilmington Trust Co.[29]	8,652	1,669,836 [30]
The News Journal Company (wholly owned)[31]	7,460	2,400,000 [30]
Cash on hand 12/31/57 less accounts payable		6,143,356
Total		$2,486,081,136

[28] duPont common stock accounts for approximately 98.5% of Christiana's assets.

[29] As of December 31, 1956, 919,124 shares of duPont common stock were held for various purposes by Wilmington Trust Co. Their market value is approximately $179,229,180. 272,342 shares of Delaware stock are held by Wilmington Trust Co.

[30] As reported in Christiana annual report for 1956.

[31] The News Journal Company is the only daily newspaper publisher in Delaware listed by Editor & Publisher Market Guide (1958), except for Delaware State News which had circulation in 1957 of 9,342.

The assets held by Delaware are:

	Shares	Market Value
Christiana preferred at asking price of $134 (9/12/58)	43,500	$ 5,829,000
Christiana common at asking price of $13,900 (9/12/58)	49,000	681,100,000
duPont preferred, closed at $102 (9/12/58)	16,256	1,658,112
duPont common closed at $201 (9/12/58)	1,217,920	244,801,920
Hercules Powder common closed at $47.25 (9/12/58)	300,000	14,175,000
Cash on hand as of 12/31/57		1,654,931
Total		$ 949,218,963

[fol. 493] C. Distribution of General Motors Stock Held by duPont

Another method of compliance with the divestiture requirement of the Clayton Act is a distribution of the General Motors stock to all duPont stockholders either at once or over a period of years. Under the Internal Revenue Code a distribution of property of this type is a dividend and taxable as ordinary income. Accordingly, distribution over a period of years is preferable and within the discretion provided by Section 11 of the Clayton Act.

A distribution over a period of years may be accomplished within the framework of duPont's present dividend policies without disturbing that company's capital structure and without causing its stockholders to pay any additional income tax. The following table demonstrates the manner in which such a distribution could be accomplished over various periods of time.

Table VII

SCHEMATIC ILLUSTRATION SHOWING EFFECTS OF MEETING PART OF DU PONT'S DIVIDEND RE-UIREMENTS THROUGH DISTRIBUTION OF GENERAL MOTORS COMMON STOCK

[The data set forth below are based on the following assumptions: (1) that the level of du Pont common stock issued and outstanding will continue at 45,604,345 shares, (2) that duPont will maintain an annual dividend rate of $6.50 per common share, (3) that the average market price of General Motors common stock will be $40 per share, and (4) that the 63,000,000 General Motors common shares now held by duPont will be distributed primarily through dividend channels.]

[fol. 494]

(A) Annual Data

Annual Dividend Rate (Per Share Of Du Pont Com.) Payable In GM Common Stock	Annual "Level Dividend" Per Share Of Du Pont Common			Number Of GM Shares To Be Distributed Annually At Various Dividend Rates [1]
	Value of GM Stock Distributed In Lieu Of Cash	Cash	Total	
1/8 share	$5.00	$1.50	$6.50	5,700,543
1/9 share	4.44	2.06	6.50	5,067,149
1/10 share	4.00	2.50	6.50	4,560,434
1/11 share	3.64	2.86	6.50	4,145,849
1/12 share	3.33	3.17	6.50	3,800,362
1/13 share	3.08	3.42	6.50	3,508,026
1/14 share	2.86	3.64	6.50	3,257,453
1/15 share	2.67	3.83	6.50	3,040,289
1/16 share	2.50	4.00	6.50	2,850,271

(B) Cumulative Data

Annual Dividend Rate (Per Share Of Du Pont Com.) Payable In GM Common Stock	Number Of Years	General Motors Shares		
		To Be Distributed In Lieu of Cash During Period of Years Indicated [2]	Amount Remaining Undistributed At End Of Period	Total
		Number of Shares		
1/8 share	11	62,705,974	294,026	63,000,000
1/9 share	12	60,805,793	2,194,207	63,000,000
1/10 share	13	59,285,648	3,714,352	63,000,000
1/11 share	15	62,187,743	812,257	63,000,000
1/12 share	16	60,805,793	2,194,207	63,000,000
1/13 share	17	59,636,451	3,363,549	63,000,000
1/14 share	19	61,891,611	1,108,389	63,000,000
1/15 share	20	60,805,793	2,194,207	63,000,000
1,16 share	22	62,705,974	294,026	63,000,000
		Value (At $40 Per Share)		
1/8 share	11	$2,508,238,960	$ 11,761,040	$2,520,000,000
1/9 share	12	2,432,231,720	87,768,280	2,520,000,000
1/10 share	13	2,371,425,920	148,574,080	2,520,000,000
1/11 share	15	2,487,509,720	32,490,280	2,520,000,000
1/12 share	16	2,432,231,720	87,768,280	2,520,000,000
1/13 share	17	2,385,458,040	134,541,960	2,520,000,000
1/14 share	19	2,475,664,440	44,335,560	2,520,000,000
1/15 share	20	2,432,231,720	87,768,280	2,520,000,000
1/16 share	22	2,508,238,960	11,761,040	2,520,000,000

[1] Exclusive of fractional shares. [2] Includes fractional shares.

[fol. 495] Recognizing that the payment of a large proportion of dividends in stock raises liquidity problems for some stockholders, the Government's basic plan provided a ten-year distribution period. Should the hearings held in this Court, and the recommendations of the proposed financial advisors, demonstrate a need for more extended period this alternative would, of course, be available.

The distribution could be accomplished by an order that a specified percentage of any dividend paid by duPont be in General Motors stock and leave the total amount to the discretion of the company and its stockholders. Thus a requirement that 50% of the dividend be in General Motors stock would result in a completed distribution in 19 years at present dividend rates. Such a program, with provision for the special position of the Christiana-Delaware group, would comply with the Clayton Act divestiture requirement, assure duPont stockholders of an adequate liquid position with respect to annual dividends, result in no increase in the taxes presently paid on dividends received, eliminate the present double taxation on General Motors dividends received by duPont, and provide assurance that divestiture would be carried out. DuPont could at its option increase its dividend by all or part of the amount of the distribution and thereby accelerate the completion of the program.

D. Sale of All General Motors Stock Held by duPont

The most direct method of complying with the devistiture requirement of the Clayton Act would be by a sale of all of the unlawfully acquired stock over such period of time [fol. 496] as may be required to effectuate an orderly disposal. There are many advantages to such a direct approach.

First, all of the stock would be sold under the direct supervision of financial advisors selected by the court. The timing of the sales would be controlled and the schedule could be adjusted, either accelerated or decelerated, as dicated by experience.

A direct sale would also avoid any administrative problems which might arise in determining the eligibility of distributees.

The tax situation would be quite clear under such a disposal. The duPont Company would pay a capital gains tax on General Motors appreciation while it held the stock. The total amount of the tax to be paid would be spread over such period of time as the court set for the completion of the sale and would not become due in any one year or, indeed, within any period short of ten or more years.

At the current market price for General Motors of $44.5 a share a total value of approximately $2,803,500,000 is

involved. Over a ten-year period annual sales averaging $280,350,000 would be required. Over a twenty-year period sales averaging $140,175,000 would be required. The marketing questions raised by sales of securities are discussed in Section V below.

E. Institutional Stockholders of Christiana

The Government has been advised that certain institutional stockholders of Christiana have evolved a plan which would permit them to exchange their stock in Christiana for [fol. 497] their allocable shares of General Motors stock which would otherwise be sold under the Government's proposed final judgment. The Government has no objection in principle to this proposal and would welcome the opportunity to discuss it with the interested persons. In view of the fact that the proposal has not been presented in detail to the Government, we are unable to comment further at this time.

[fol. 498] As to subparagraph (c) of the General Motors memorandum the decree would not forbid General Motors to do business with duPont, nor would it necessarily restrict the amount of such business. The section of the proposed decree in question would merely require cancellation of present requirements contracts existing between the parties. General Motors would still be free at its option to purchase identical amounts of the products in [fols. 499-502] question from duPont but would have the advantage of being free to take its business elsewhere should it so choose.

[fol. 503] In the United States District Court for the Northern District of Illinois, Eastern Division

Memorandum on Denial of Motion for Preliminary Injunction—Nov. 3, 1958

The government requests that the court enter a preliminary injunction enjoining and restraining defendants from having interlocking corporate personnel and duPont, Christiana and Delaware from voting General Motors stock or increasing their equity interests in General Motors.

Said motion is supported by the affidavit of government counsel, wherein he avers that

> "In view of the substantial agreement of the parties and amici curiae concerning the minimum relief which is required in this case to eliminate the effects of the acquisition of General Motors stock by duPont, the government asks that this minimum relief be granted without further delay. * * *"

In addition, affiant avers that General Motors has announced changes of a "far reaching nature in the organization of that company" reportedly being selection of a new Chairman of the Board and a new President appointed by its directors; that the present board includes six persons "who are at the present time directors of du Pont" and that it is "substantially agreed among the parties to this case and amici curiae" that these should no longer be permitted to serve in this dual capacity; that the election of directors was accomplished in large part through the exercise of voting rights of the unlawfully acquired stock now held by du Pont which all parties are agreed may no longer be exercised by du Pont.

[fol. 504] Therefore, it is requested that

(1) du Pont, Christiana and Delaware be enjoined and restrained from exercising voting rights, or soliciting any other person, in any manner with respect to exercising voting rights, directly or indirectly, on General Motors stock, by whomever owned of record or beneficiary;

(2) General Motors be restrained and enjoined from having as a director, officer or employee any person who is a director, officer or employee of du Pont, Christiana or Delaware;

(3) du Pont, Christiana and Delaware be enjoined and restrained from having as a director, officer, or employee any person who is a director, officer or employee of General Motors;

(4) du Pont, Christiana and Delaware be enjoined and restrained from nominating any person as a director, officer or employee of General Motors;

(5) du Pont, Christiana and Delaware be enjoined and restrained from acquiring directly or indirectly any Gen-

éral Motors stock provided they shall not be prevented from (1) accepting any shares which may be distributed by General Motors with respect to outstanding shares already held, or (2) electing to exercise rights to purchase General Motors stock which are made available on an equal basis to all General Motors stockholders.

On June 3, 1957 the Supreme Court of the United States found that the defendants violated the Clayton Act. The government urges that this finding ipso facto supports its conclusion that irreparable injury will result in delaying the granting of the relief requested, until the entry of a final decree. No evidence was offered at a hearing on this motion, other than the affidavit of government counsel, and it appears that it is predicated on the same factual cir- [fol. 505] cumstances which prevailed at the time the Supreme Court made its decision sixteen months ago, except for the vague averment that General Motors has recently announced "far reaching changes in the organization of that company".

Counsel for defendants deny that they would not object to the granting of the relief requested at this stage of the proceeding. It is a matter of public record that an election of Board members and officers of General Motors was held in May 1958, some months previous to this motion. Counsel for defendants state that there is no need to restrain the exercise of voting rights now because there will be no election of General Motors officers and directors until May 1959.

Defendants counsel represent that du Pont has not purchased any General Motors stock during the past twenty-seven years, and offer to stipulate that no additional stock will be acquired in the future. Counsel for Christiana and Delaware assure the court that their clients have no intention of purchasing any General Motors stock.

The government has agreed to present its evidence on January 26, 1959 at the hearing for the final relief to be granted, which hearing includes the portion of the relief now sought on this motion.

It appears to the court that the final phase of this case will be determined soon and the end of this protracted litigation is in sight. The court is of the opinion that the circumstances do not justify the inexpedience of a piece-

meal determination of issues at this posture of the case; that is, on the eve of the final disposition.

Further, the court is of the opinion that the government has failed to show that irreparable injury will result if the relief requested is not granted immediately.

This memorandum shall constitute the court's findings of fact and conclusions of law and an order has this day been entered denying the motion for preliminary injunction.

/s/ Walter J. La Buy, Judge, United States District Court.

November 3, 1958.

[fols. 506-507] Earl A. Jinkinson, Esquire, Department of Justice, Anti-trust Division, Room 404, United States Courthouse, Chicago 4, Illinois; George Ragland, Jr., Esquire, Sidley, Austin, Burgess & Smith, 11 South La Salle Street, Chicago 3, Illinois; Mayer, Friedlich, Spiess, Tierney, Brown & Platt, 231 South La Salle Street, Chicago 4, Illinois; Howard Ellis, Esquire, Prudential Plaza, 130 East Randolph Drive, 29th floor, Chicago 1, Illinois; Andrew J. Dallstream, Esquire, 231 South La Salle Street, Chicago 4, Illinois; Manuel E. Cowen, Esquire, One North La Salle Street, Chicago, Illinois.

[fol. 508] [File Endorsement Omitted.]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title Omitted]

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION—Nov. 3, 1958

This cause having been heretofore taken under advisement on the plaintiff's motion for preliminary injunction, after due consideration and the Court being fully advised files herein its memorandum opinion which constitutes the Court's findings of fact and conclusions of law and it is

Ordered that the plaintiff's motion for preliminary injunction be and hereby is denied.

[fol. 508a] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1071

UNITED STATES OF AMERICA, PLAINTIFF,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL., DEFENDANTS.

TRANSCRIPT OF PRE-TRIAL PROCEEDING OF NOVEMBER 17, 1958 RE DEPOSITIONS, DISCOVERY AND HEARING DATE

had in the above-entitled cause before the Honorable Walter J. LaBuy, one of the judges of said court, in his courtroom in the United States Courthouse at Chicago, Illinois, on November 17, 1958 at 10:30 a.m.

APPEARANCES:

Present: Mr. Earl Jinkinson, Chief, Antitrust Division, Chicago, Illinois; and Mr. George Reycraft, Mr. Paul Owens, Mr. Eugene Metzger, and Mr. Edmund Ludlow, Antitrust Division, Washington, D. C. On behalf of the Government;

[fol. 508b] Sidley, Austin, Burgess & Smith, by Mr. George Ragland, Jr., 11 South LaSalle Street, Chicago 3, Illinois, and Covington & Burling, by Mr. John Lord O'Brian, Mr. Hugh B. Cox, Mr. Charles A. Horsky, and Mr. Daniel M. Gribbon, 11 South LaSalle Street, Chicago 3, Illinois. On behalf of the Defendant, E. I. duPont de Memours and Company;

Kirkland, Fleming, Green, Martin & Ellis, by Mr. Howard Ellis and Mr. Don H. Reuben, 130 East Randolph Drive, Chicago 1, Illinois, and Dewey, Ballentine, Bushby, Palmer & Wood, by Mr. Wilkie Bushby, Mr. Philip C. Scott, Mr. Leonard Joseph, 40 Wall Street, New York 5, New York. On behalf of the Defendants, Christiana Securities Company and Delaware Realty & Investment Corporation;

Mayer, Friedlich, Spiess, Tierney, Brown & Platt, by Mr. Leo Tierney, and Mr. Bryson P. Burnham, 231 South La-

[fol. 508c] Salle Street, Chicago 4, Illinois, and Mr. Henry M. Hogan and Mr. Robert A. Nitschke, General Motors

Building, Detroit 2, Michigan. On behalf of the Defendant General Motors Corporation;

Mr. Andrew J. Dallstream, 231 South LaSalle Street, Chicago 4, Illinois. *Amicus Curiae* with respect to the interests of the Stockholders of E. I. duPont de Nemours & Co.;

Mr. Manuel Cowan, One North LaSalle Street, Chicago 2, Illinois. *Amicus Curiae* with respect to the interests of the Stockholders of General Motors Corporation.

[fol. 508d] The Clerk: No. 49 C 1071, United States versus E. I. du Pont de Nemours and Company, et al., pretrial hearing.

Mr. Ragland: The parties have all agreed on the pretrial order that you requested at the October 30th hearing, and it is in that form. I think everybody has copies, but I have been furnished with a lot of extra copies, if anybody should need them.

The Court: If there are no objections, it will be approved.

Mr. Ragland: Everybody is agreed. Thank you.

The Court: Does counsel wish to be heard? I note a motion has been filed for taking of depositions.

STATEMENT ON BEHALF OF GENERAL MOTORS BY MR. TIERNEY

Mr. Tierney: Inasmuch as this is a pre-trial conference and counsel are here from as far away as Florida, there are some very serious matters that we should, I think, present to your Honor today, that have occurred since we were last here, and I am prepared, with your Honor's permission, to make some observations, particularly with respect to what is happening by way of discovery on the part of the Government.

Your Honor will recall that this case, which was decided on June 3 of 1957, was remanded to you for relief with this language of the Supreme Court:

> "The judgment must, therefore, be reversed and the cause remanded to the District Court for a determina-
> [fol. 508e] tion, after further hearing, of equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute."

Now, the case is here under that mandate which followed that opinion. It came down on July 18, 1957.

Now, we had a pre-trial conference here on October 30th, and at that time the government handed to your Honor and to counsel a document which it called, "Government's Proposed Agenda for Pre-trial Conference", and under Paragraph 2 of "Discovery" they say, and I quote:

> A schedule of depositions to be taken by the government shall be filed on or about November 14, 1958.

At four o'clock on November 14, 1958 we received and I speak for General Motors here—that so-called schedule. Now, that schedule lists the names of nine witnesses—three duPont witnesses, five General Motors witnesses, and one investment banking witness. These depositions are scheduled on December 1, 2 and 3 in Wilmington; December 8, 9, 10 and 15 in Detroit; December 17 in Detroit; and on January 5 in New York.

In that document which was filed here on October 30th there is the following paragraph:

> "(b) As to additional depositions to be taken by the government, a schedule shall be filed within ten days of completion of the schedule referred to in Paragraph A."

[fol. 508f] which means, in light of the schedule that we received on November 14th, that within ten days following the deposition of Mr. Emerson in New York, which begins on January 5th, ten days thereafter we will receive a schedule of further depositions. Now those are the papers that are here before your Honor.

In this morning's mail I received a set of subpoenas duces tecum issuing from a court in Detroit, Wilmington, and New York. Now, they seek to take the deposition and have called upon General Motors to produce these types of documents:

> "All reports, studies, memoranda and other writings prepared by you, or submitted to you by any employee of General Motors at any time from January 1, 1950 to date, relating or referring to the application or use in the automotive industry of chemical products."

A like request is made upon Mr. Chayne of General Motors, and a like request is made upon Mr. Nixon of General Motors.

In addition to that they served a subpoena upon Mr. Stanley who is a vice president, and upon Mr. Russell who is a vice president, to produce in New York such things as—does your Honor have a copy of that?

The Court: Yes, I have it before me.

Mr. Tierney. You will notice in Paragraph 3 they call for:

> [fol. 508g] "All reports, studies, memoranda, dated or written at any time from January 1, 1950 to date, relating or referring to
>
> '(a) The adoption of any stock option plan.
> '(b) The sale by General Motors of its capital stock to any group including underwriters, employees' bonus funds, pension funds, and other similar groups;
> '(c) The purchase of General Motors capital stock by any group including underwriters, employee bonus funds, pension funds, and other similar groups.'"

In Paragraph 4 they want the

> "Minutes of all meetings held at any time from January 1, 1950 to date, of any committee of which you are or have been a member, relating to or referring to
>
> '(a) The adoption of any stock option plan;
> '(b) The purchase by General Motors of its capital stock for any purpose;
> 'The sale by General Motors of its capital stock to any group including underwritters, employee bonus funds, pension funds, and other similar groups.'"

And upon the witness Emerson, they seek to have him produce—incidentally, we do not appear for Emerson, but it is important to note what is going on here so far as this discovery is concerned—in Paragraph 2 of that they want,

> "All studies, reports, summaries and memoranda dated or written at any time from January 1, 1950 to date, relating to or referring to the issuance of security having an aggregate value in excess of $25,000,000, in [fol. 508h] any part of which your firm participated."

Well, imagine what that calls for!

Now, your Honor, my opinion is that to take discovery at this late date in the way the government is now attempting it is not only an imposition upon court and counsel, but it is an outrageous procedure for them to follow.

When the government filed its proposed judgment in this case, it suggested that duPont be required to dispose of its General Motors stock. When they filed their memorandum reply brief in this case, they state on page 1 of that memorandum, and I quote:

> The two major issues open in this proceeding are, the time to be fixed for divestiture of the stock, and the manner in which the stock is to be divested.

Now, we frankly say to your Honor that any evidence, whether they get it by deposition or otherwise, that are relevant to those issues that they have tendered here, we have no objection to. But we do object, and vehemently, to this sort of a fishing expedition upon issues that are completely out of this case at this time, and we think it is unfair to court and counsel. For example, Mr. Chayne. He is in charge of engineering development and Mr. Nixon is on the research staff of General Motors, and has to do with electroplating, chemical electroplating, chemical and metal. [fol. 5081] Mr. Wirshing was a witness here as you recall in this case. He is the director of the chemical analysis section. We are satisfied, knowing as we do, the duties that are imposed upon these people, that they are thoroughly incompetent to testify to any issues with respect to the time and manner of divestiture, as the government insists is the sole remedy in this case.

Now, then, your Honor, with respect to the two witnesses, Russell, and Stanley, we are frank to admit that Russell will have information, all of which we fill be happy to furnish, with respect to the purchases of General Motors stock for the bonus plan. We recognize and admit that they would be competent witnesses.

In view of this broad discovery, we call upon the government at this time in the aid of expediting this trial which incidentally, your Honor, was temporarily set for January 26th, finds us taking depositions right up until about the middle of January, and I am sure that all counsel most reasonably would request from your Honor 30 days after

depositions have been taken before they go to trial. You see, we will be engaged in these depositions Monday and Tuesday and Wednesday of one week, Monday, Tuesday and Wednesday of another week, and then finally they skip a few days and we go over to January 5th and, your Honor, it is all with respect to matter that is not relevant to the issues.

[fol. 508j] Now, then, we would like to ask the government these questions, and we think that the government should tell your Honor now—not tomorrow or the next day—but tell us now, what is it that the government expects to prove by each of the General Motors witnesses and the duPont witnesses and what is the relevance to the issues now remaining in this case. Does the government intend to take more depositions after it finishes the nine now scheduled, and if so, when, of whom, and about what?

Does the government intend to serve interrogatories on any departments, and if so, when, and about what?

And last, your Honor, we would like to know if the government wouldn't agree to take the depositions here in Chicago, upon our agreement undertaking to produce our witnesses here. Now we think that in fairness, with a pre-trial conference and trial hanging ahead of us, that the government ought to come forward and tell us the answers to those questions.

Here are a copy of those that I have read.

Now your Honor has the power under Rule 30(b) and the decision under Rule 30(b) despite the fact that these subpoenaes to take these depositions have been issued by clerks of courts in other jurisdictions, to limit these depositions, and unless we can get from the government an agreement [fol. 508k] today, we will then be constrained to file the motions and bring the matter on for hearing before your Honor, which is going to consume more time and put this trial date off. I assure your Honor that, and speaking for my client, we are as anxious to get this disposed of as early as your Honor. We feel that the government should tell us now what they propose to do, and I trust that in the future when they serve any papers on us, they will get to us just before we walk into court.

Mr. Reycraft: Your Honor, I believe it was last Thursday when I discussed first with counsel the nature of the depositions which we requested that your Honor permit us

to take. At that time we furnished orally a list of the witnesses to Mr. Horsky, and we showed him drafts of the subpoenas we intended to issue, and we did file our schedule on Friday as we told your Honor we would:

I believe that Mr. Tierney was informed of the nature of the depositions and of the scope of the depositions last week, some time.

With respect to the purpose—

Mr. Tierney: You certainly didn't inform me. I had no conversation with you.

STATEMENT ON BEHALF OF UNITED STATES BY MR. REYCRAFT

Mr. Reycraft: I understood your Honor that Mr. Tierney had been informed by counsel that these depositions were to be taken and the names of the witnesses and the issues. [fol. 508l] As far as the purpose of the depositions is concerned, we think that certainly future trade relations between the defendants are hardly relevant, and of course the application of chemical products in the automotive industry is the purpose for which we want to take these depositions, to examine into the scope of the future applications and to examine into the trade relations for statistical purposes between the time of the termination of the last evidence that was put in at the trial, and to bring it up to date.

Now we don't understand that Mr. Tierney has conceded the sole issue in this case is the manner and timing of divestiture. We have, in addition, asked for an injunction relating to trade relations, and we think we should be permitted to inquire into trade relations for the purpose of establishing the necessity for these injunctions.

We have no objection to discussing with Mr. Tierney the extent of the files which may be involved in the subpoenas. We certainly do not have in mind a fishing expedition. We don't know the scope of his files, and we have no objection whatever to sitting down and talking with him about it and limiting the nature of the files that have to be examined.

[fol. 508m] As far as the timing of our discovery is concerned, we didn't feel that it was appropriate to begin discovery until after the issues have been properly framed, which we think they are now after all of the memoranda and proposed judgments have been filed.

As to future depositions we certainly have in mind only that in the event this limited discovery which we propose to raise should indicate the names of other persons that might have material information that we might possibly request your Honor that we be permitted to take their depositions.

We also understood that counsel might wish to discuss the question of interrogatories so that we would not have to trouble your Honor with rulings on interrogatories. A good deal of the information that we will request is of the static type which could very easily be arranged between counsel.

If Mr. Tierney prefers, we have no objection whatever to filing of formal motions, and we will do so very promptly.

We don't see the necessity either for taking the depositions in Chicago. We don't think that it is a convenience to anyone, and we think the papers, for example the papers in the case of General Motors are located in either Detroit or New York, and in the case of duPont we believe they are [fol. 508n] located in Wilmington. And with respect to Morgan Stanley the papers there also appear to be located in New York.

If your Honor wishes us to take the depositions here, of course we will do so.

RULINGS OF COURT

The Court: Well, that is the request of the defendant, and if it doesn't make any difference to the government as long as they produce the records here, and the witnesses, I think it would be more convenient for them to take it here.

Mr. Reycraft: Well, if your Honor wishes, that is agreeable to the Government.

The Court: I think that is a reasonable request, but as to the other objections, it appears to the court, in shaping this decree, the question of trade relations is involved, and it may be helpful to the court to have additional information on that subject.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Tierney: If the Court please, before you finally conclude, I would like to call your attention to the govern-

ment's statement in its reply brief of September 26, 1958, on page 66. This is what they have to say about trade relations:

> "As to sub-paragraph C of the General Motors memorandum, the decree would not forbid General Motors to do business with duPont, nor would it necessarily restrict the amount of such business. The section of the proposed decree in question would merely require cancellation of present requirements contracts [fol. 508o] existing between the parties."

Now that is the interpretation they put upon their decree. It is a little difficult for me to understand. They have a finding of the Supreme Court that there is a likelihood that there may be a monopoly of a line of commerce definitely defined in the opinion as "finishes and fabrics", and this broad subpoena is anything that involves chemicals.

The Court: I think counsel should confer, and there should be some limitation upon it.

Mr. Tierney: Well, let me say this, your Honor: We propose to file formally with your Honor a formal motion with the opportunity to be better prepared to argue this, and we will do it promptly on the objections to the depositions, and ask the court to limit it.

The Court: Well, first of all I would suggest that you hold a conference, and see if you can't agree. I have indicated what my ruling is—within reasonable limitations, of course.

Mr. Reycraft: If your Honor please, I would like to read the subpoena to Mr. Wirshing that Mr. Tierney referred to. It asks for "reports, studies and memoranda and other writings prepared by you or submitted to you by General Motors employees from 1950 to date——

Mr. Tierney: Relating to what?

Mr. Reycraft: Relating to the application and use in [fol. 508p] the automotive industry of chemical products. We concede this to be quite a narrow——

The Court: That is very broad.

Why don't you confer and come back maybe tomorrow.

Mr. Tierney: Your Honor, I have had no opportunity to confer with Mr. Reycraft about anything.

The Court: Well, you should confer today and report

back tomorrow morning. If there are any objections, I will hear them. I will rule on them. There should be a reasonable limitation.

All right, does anybody else wish to be heard here this morning?

Mr. Cox: If it please the Court, I would like to ask the court for some guidance on one or two procedural matters such as particularly the question Mr. Tierney has raised about a tentative trial date. I realize that it may be hard for Mr. Reycraft to tell us exactly how long this discovery is going to last, but at some appropriate time—and maybe this isn't the time, this morning—I should like to take whatever steps are necessary to submit to your Honor the request that we be given at least 30 calendar days after the discovery is ended before we have to start the hearing. I have no reason to suppose Mr. Reycraft will object to that. [fol. 508q] The Court: Well that is a reasonable request.

What is the last scheduled date of these?

Mr. Reycraft: January 5th.

The Court: Well, I would say tentatively then, say February 5th.

Mr. Cox: What about February 16th? Would that be all right?

Mr. Reycraft: In case several days are involved, your Honor.

The Court: Is that on a Monday?

Mr. Cox: Yes.

The Court: All right, it will be re-set then to the 16th of February.

Now I hope you will all be ready at that time, gentlemen, and I am sure you are agreeable to cooperate with the court and expedite this matter and finally terminate it.

Mr. Reycraft: Yes, indeed.

Mr. Cox: I certainly would like to do it.

The Court: Very well. February 16th.

Mr. Cox: Judge, Mr. Ragland has prepared a form of language for an order on the place of the taking of the depositions which we might give to Mr. Reycraft.. This order, Judge, also contains one other matter which I am sure we will have no controversy with Mr. Reycraft about. [fol. 508r] You may recalled that Rule 30(b) provides that in making the protective order, the court may protect

against disclosure of secret processes, developments and research. That may be—I don't suppose it will be—but it might arise in connection with the three duPont men whose depositions have been noticed because they are technicians who work on research matters, and not salesmen. So this order provides that none of the deponents need disclose any secret processes, developments, or research, except upon further order of this court.

I take it Mr. Reycraft probably wouldn't have any objection to that.

Mr. Reycraft: Your Honor, we think it may be somewhat premature to enter such an order. We would first like to find out whether any question comes up as to secret processes. We don't know that they will. We think it is premature at this time to enter such an order.

Mr. Cox: Well this provides, Mr. Reycraft, that if the question comes up, that we come back to the court.

The Court: I think that is reasonable. Very well, then you will report back tomorrow morning.

Do you wish to be heard, Mr. Ellis?

Mr. Ellis: Yes, your Honor, I have a matter which is not momentous. I think it should be handled informally. I have discussed it with the government and co-counsel. [fol. 508s] In your Honor's opinion which accompanied the denial of the government's motion for temporary injunction, there is a typographical error which should perhaps be corrected.

On the second page of that opinion it is stated that "The Supreme Court of the United States in its opinion found that the defendants violated the Clayton Act."

The Court: Oh, yes, that was called to my attention after the memorandums were sent out. That should be corrected on its face to read that the "Supreme Court found a violation of the Clayton Act." It didn't find a violation against the defendants.

Mr. Ellis: It is certainly not too momentous, as I say.

The Court: The Clerk will make a note to correct the memorandum on its face.

Mr. Cox: There was one other matter I might mention just as a matter of caution. As Mr. Tierney said, one of these depositions, these notices to take depositions, and one of the subpoenas runs to Morgan, Stanley and Com-

pany. No counsel present this morning represents Morgan, Stanley and Company. They may have some problems about the deposition or the notice. I have talked to Mr. Sumner Emerson of Morgan, Stanley and have suggested [fols. 508t-509] to him that in the first instance those should be taken up informally with Mr. Reycraft to see if they could be worked out, but I wanted to make it clear that we cannot speak for them definitively this morning.

Mr. Reycraft: I understand that.

The Court: Very well, and will counsel report back at 10:15 tomorrow morning, those of you who are interested.

Mr. Cox: With your permission I won't be here tomorrow.

The Court: Very well.

[fols. 510-513] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1071

UNITED STATES OF AMERICA, Plaintiff,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL., Defendants.

PRE-TRIAL ORDER—NOV. 17, 1958

[fols. 514-515] 7. As to the transcript

The corrected printed transcript of the proceedings shall be taken as the official and authentic transcript, both for the purposes of the trial and upon appeal, if any appeal be taken. In the interval between the delivery of the typewritten transcript and the corrected print thereof, the typewritten transcript shall be taken as the official and authentic record of the proceedings.

Enter:

Walter J. La Buy, United States District Judge.

November 17, 1958.

[fols. 516-520] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title Omitted]

ORDER RE PRE-TRIAL CONFERENCE AND TRIAL—Nov. 17, 1958

On motion of the defendants it is

Ordered that the Court's memorandum opinion filed on November 3, 1958 be and it hereby is corrected so that line 2 of paragraph 6, page 2, will read "the United States found a violation of" and that the words "that the defendants violated" be and they hereby are striken and on motion of defendants it is

Further Ordered that the trial of this cause be and it hereby is reset from January 26, 1959 to February 16, 1959. It is

Further Ordered that the pre-trial conference be and it hereby is adjourned to November [illegible], 1958 at 10:15 A.M.

[fol. 521] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

REQUEST OF UNITED STATES FOR ADMISSIONS OF FACT—Filed Jan. 13, 1959

Plaintiff, United States of America, requests the defendant General Motors Corporation, within twenty days after service of this request to admit, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of each of the following statements, and of each part thereof, as required by Rule 36 of the Federal Rules of Civil Procedure:

A. Each of the categories of materials or products listed below and each of the materials or products listed under each category has been used by one or more Divisions of the General Motors Corporation at some time during the

period beginning January 1, 1955 and ending September 30, 1958:

[fol. 522] 1. Fabrics, Yarns, and Fibers

(a) pyroxylin coated fabric
(b) vinyl plastic coated fabric
(c) rubberized fabric
(d) synthetic rubber coated fabric
(e) tetrafluoroethylene resin coated glass fabric
(f) rayon fabric
(g) rayon tire cord
(h) nylon fabric
(i) nylon tire cord
(j) polyester fabric
(k) acrylic fabric

2. Finishes and Associated Products

(a) clears
(b) enamels
(c) lacquers
(d) acrylic paints
(e) graining compounds
(f) primers
(g) sealers
(h) polishing and rubbing compounds
(i) putties
(j) solvents

3. Plastics and Films

(a) acrylic resin
(b) acrylic syrup (reinforcing type)
(c) polyethylene resin
(d) polyvinyl butyral resin
(e) polyvinyl butyral sheet
(f) cellulose acetate
(g) nylon resin (soluble resin)
(h) nylon resin (molding powder)
(i) polyvinyl acetate solution
(j) tetrafluoroethylene resin (aqueous dispersion)
(k) tetrafluoroethylene resin (molding powder)
(l) polyester film
(m) polyester resin (reinforcing type)
(n) polyester resin (polyurethane type)

4. Antifreeze

(a) ethylene glycol type
(b) methanol type

[fol. 523] 5. Brake Fluid

6. Cleaning and Degreasing Chemicals

(a) acids for pickling and tarnish removal
(b) aluminum cleaners
(c) alkaline soak cleaners
(d) alkaline electrolytic cleaners
(e) alkaline and solvent type paint removers
(f) glass cleaners
(g) solvent emulsion cleaners
(h) solvent cleaners
(i) rust removers and preventives

7. Plating Chemicals

(a) anodes
(b) dips
(c) brighteners
(d) plating salts
(e) addition agents

8. Case Hardening Compounds

9. Synthetic Rubber

(a) Neoprene
(b) "Hypalon"

10. Rubber Chemicals

(a) accelerators
(b) antioxidants
(c) lubricants
(d) wetting agents
(e) surface conditioning agents
(f) colors
(g) organic isocyanates

11. Refrigerants

(a) "Freon"
(b) methyl chloride

12. Automotive Maintenance Accessories
    (a) acid and rust inhibitor
    (b) water pump lubricant
    (c) auto wax
[fol. 524] (d) bug remover
    (e) sealing compound
    (f) soapless car wash
    (g) chrome polish
    (h) windshield sealer
    (i) cooling system cleanser
    (j) cooling system sealer
    (k) tar and oil remover
    (l) upholstery cleaner
    (m) gasoline additive to prevent freezing
    (n) heavy duty sealer
    (o) tire black
    (p) rubber lubricant
    (q) auto polish
    (r) auto rubbing compound
    (s) auto touch-up enamel
    (t) auto cleaner
    (u) auto convertible top dressing

B. Acrylic resin has been used by one or more Divisions of General Motors Corporation in the manufacture of the products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Lenses, dials and pointers
2. Exterior lenses
3. Control knobs
4. Traffic light view lenses
5. Sun visors
6. Fender guide lights
7. Decorative medallions
8. Hood ornaments
9. Reflectors

C. Acrylic syrup has been used by one or more Divisions of General Motors Corporation in the manufacture of the products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Reinforced plastic parts
2. Surface overlays for reinforced plastic parts

[fol. 525] D. Polyethylene resin has been used by one or more Divisions of General Motors Corporation in the manufacture of the products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Lamp socket spacers
2. Cable clamps
3. Wire insulation
4. Spring liners
5. Ball joint dust covers
6. Film for water barrier
7. Temporary seat covers
8. Temporary convertible top covers
9. Floor mat fasteners
10. Bodyhole plugs

E. Polyvinyl butyral sheet has been used by one or more Divisions of General Motors Corporation in the manufacture of the product listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Safety glass interlayers

F. Cellulose acetate has been used by one or more Divisions of General Motors Corporation in the manufacture of the products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Control knobs
2. Connectors
3. Dial pointers
4. Tail light lenses
5. Interior handles and knobs
6. Steering wheels
7. Arm rests
8. Buttons
9. Bezels

G. Nylon resin (molding powder) has been used by one or more Divisions of General Motors Corporation in the manufacture of the products listed below during the period be-
[fol. 526] ginning January 1, 1955 and ending September 30, 1958:

1. Carburetor accelerator cams
2. Carburetor fast idle cams

3. Fuel line tubing
4. Gas gauge float spacers
5. Fuse holders
6. Dome light lenses
7. Sealed beam unit lock nuts
8. Lamp sockets
9. Solenoid insulators
10. Generator insulators
11. Fuse block covers
12. Push button covers
13. Starter motor insulators
14. Rotors for headlight foot dimmer
15. Horn ring insulators
16. Motor commutator end plates
17. Distributor plate separators
18. Distributor cable holders
19. Retainer rings
20. Courtesy light switch housings
21. Wire clips and connectors
22. Push button control collector rings
23. Push button control contact cams
24. Voltage regulator bases
25. Window regulator switch handles
26. Switch control cams
27. Radio touch-tuning bars
28. Speedometer driving gears
29. Speedometer take-off gears
30. Clutch pedal bushings
31. Clutch linkage bushings
32. Windshield wiper cams
33. Windshield wiper gears
34. Speedometer worm gears
35. Heater control slide bushings
36. Heater control linkages
37. Mirror socket bushings
38. Mirror flippers
39. Windshield washer valves
40. Windshield washer T-connections
41. Rod and gear for antenna elevating devices
42. Oil pan drain plug gaskets
43. Tubing for vacuum spark lines
44. Brake pedal bushings
45. Brake hub spring insulator bushings

[fol. 527] 46. Brake linkage bushings
47. Master brake cylinder push rod bushings
48. Center link bushings
49. Upper steering column bushings
50. Tire valve caps
51. Tubing for automatic lubrication systems
52. Tubing for air suspension systems
53. Air suspension levelling valve components
54. Window regulator gears
55. Window crank knob bushings
56. Window crank handle bearing plates
57. Window regulator rollers
58. Window regulator antirattle plates
59. Window slides
60. Lock control bushings
61. Door hinge bushings
62. Door weatherstrip flippers
63. Front seat back stops
64. Door check slide blocks
65. Door latch wedges
66. Trunk latch wedges
67. Tubing for pneumatic window regulators

H. Tetrafluoroethylene resin (molding powder) has been used by one or more Divisions of General Motors Corporation in the manufacture of the products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Carburetor throttle valve bearings
2. Transmission switch diaphragms
3. Clutch lever bearings
4. Speed controller thrust bearings
5. Thermostats
6. Valve seats and seals
7. Power steering shaft seals
8. Power steering piston rings
9. Power steering lock nut gaskets
10. Power steering unit assembly gaskets
11. Additive in grease, ball joints

I. Polyester film has been used by one or more Divisions of General Motors Corporation in the manufacture of the

products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

[fol. 528] 1. Upholstery
2. Upholstery welting
3. Door panels and inserts
4. Kick plates
5. Exterior trim

J. Polyester resin (reinforcing type) has been used by one or more Divisions of General Motors Corporation in the manufacture of the products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Heater housings
2. Air conditioner housings
3. Car bodies
4. Sports car bodies
5. Seat frames
6. Car tops
7. Instrument panels
8. Convertible top covers
9. Hoods
10. Fender fins
11. Window frames
12. Station wagon rails
13. Arm rests
14. Truck bodies
15. Truck body sections
16. Truck radiator grills

K. Polyester resin (polyurethane type) has been used by one or more Divisions of General Motors Corporation in the manufacture of the products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Foam seat units
2. Foam seat topper pads
3. Instrument panel padding
4. Arm rests
5. Sun visor padding
6. Temperature and sound insulation units
7. Adhesives

8. Carpet underlay
9. Headliners
10. Door panel padding

[fol. 529] L. Ethylene glycol type antifreeze has been purchased by one or more Divisions of General Motors Corporation during the period beginning January 1, 1955 and ending September 30, 1958 for:

1. Factory fill
2. Distribution through dealer organization under private label

M. Methanol type antifreeze has been purchased by one or more Divisions of General Motors Corporation during the period beginning January 1, 1955 and ending September 30, 1958 for:

1. Factory fill
2. Distribution through dealer organization under private label

N. Brake fluid has been purchased by one or more Divisions of General Motors Corporation during the period beginning January 1, 1955 and ending September 30, 1958 for:

1. Factory fill
2. Distribution through dealer organization under private label

O. Organic isocyanates have been used by one or more Divisions of General Motors Corporation in the manufacture of the products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Foam seat units
2. Foam seat topper pads
3. Instrument panel padding
4. Arm rest padding
5. Sun visor padding
6. Temperature and sound insulation units
7. Adhesives
8. Carpet underlay
9. Headliners
10. Door panel padding

[fol. 530] P. "Freon" refrigerant has been used by one or more Divisions of General Motors Corporations in the manufacture of the products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Automotive air conditioning units
2. Household air conditioning units
3. Household refrigerators
4. Industrial refrigeration units
5. Automotive air suspension system pouches

Q. Methyl chloride refrigerant has been used by one or more Divisions of General Motors Corporation in the manufacture of the products listed below during the period beginning January 1, 1955 and ending September 30, 1958:

1. Automotive air conditioning units
2. Household air conditioning units
3. Household refrigerators
4. Industrial refrigeration units

R. The automotive maintenance accessories referred to in paragraph A-12 hereof are distributed through the General Motors Corporation dealer organization under private label.

S. The General Motors Corporation, or one or more of its Divisions, has recently adopted a new self-leveling electroplating process developed by the du Pont company.

T. The General Motors Corporation, or one or more of its Divisions, is currently considering a new du Pont product, "Delrin" acetal resin, and specifically for the following applications:

1. Instrument panels
2. Instrument cluster housings
3. Carburetor castings and covers

[fols. 531-532] 4. Fuel pump castings and covers
5. Bushings
6. Bearings
7. Gears
8. Interior knobs and handles
9. Fuel line tubing
10. Speedometer cable housings
11. Carburetor functional components
12. Squirrel cage blower

U. The General Motors Corporation, or one or more of its Divisions, is currently considering polyethylene resin for the following applications:

1. Battery cases
2. Battery cell separators
3. Battery caps

V. The General Motors Corporation, in 1955, negotiated a license agreement with du Pont relating to the development and use by General Motors of polyurethane foam.

W. Each of the twelve categories of materials or products listed under paragraph "A", and each of the materials or products listed under each of them, has been purchased by General Motors Corporation from du Pont during the period January 1, 1955 through September 30, 1958.

[S.] Edmund D. Ludlow, Attorney, Department of Justice.

Dated: Jan. 12, 1959

[fol. 532A] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

Transcript of Pre-Trial Proceedings—January 19, 1959

Re motions to produce, further discovery and requests for Admissions had in the above-entitled cause before the Honorable Walter J. LaBuy, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois, on January 19, 1959 at 10:30 a.m.

APPEARANCES

Present: Mr. George Reycraft and Mr. Eugene Metzger, Antitrust Division, Washington, D. C., on behalf of the Government;

Sidley, Austin, Burgess & Smith, by Mr. George Ragland,

Jr., 11 South La Salle Street, Chicago 3, Ill., *and* Coving-
[fol. 532B] ton & Burling, by Mr. Hugh B. Cox, on behalf of the Defendant E. I. duPont de Nemours and Company; Kirkland, Ellis, Hodson, Chaffetz & Masters, by Mr. Howard Ellis and Mr. Don H. Reuben, 130 East Randolph Drive, Chicago 1, Ill., *and* Mayer, Friedlich, Spiess, Tierney, Brown & Platt, Mr. Leo F. Tierney and Mr. Bryson P. Burnham, 231 South LaSalle Street, Chicago 4, Ill., *and* Mr. Henry M. Hogan and Mr. Robert A. Nitschke, General Motors Bldg., Detroit 2, Michigan, on behalf of the Defendant General Motors Corporation;

Mr. Andrew J. Dallstream, 231 South LaSalle Street, Chicago 4, Ill., *Amicus Curiae* with respect to the interests of the Stockholders of E. I. duPont de Nemours & Co.

Mr. Manuel Cowen, One North La Salle Street, Chicago 2, Ill., *Amicus Curiae* with respect to the interests of the Stockholders of General Motors Corporation.

[fol. 532C] The Court: Good morning, gentlemen.

STATEMENT OF COURT

Now, before hearing from counsel I would like to make an observation. I notice that Article IX of the Government's proposed decree, which deals with trade relations, was interpreted by the Government in its brief of September 26, 1958, as follows:

> "The decree would not forbid General Motors to do business with du Pont; nor would it necessarily restrict the amount of such business. The section of the proposed decree in question would merely require cancellation of present requirements contracts existing between the parties. General Motors would still be free at its option to purchase identical amounts of the products in question from du Pont, but would have the advantage of being free to take its business elsewhere, should it so choose."

Now, in view of the Government's announced position, I would like to have you explain the relevancy of the data requested in these pending motions.

be permitted to show the current market which is affected by the illegal stock ownership by du Pont in General Motors. We have found out by interrogatories that this trade relations amounts to seventy million dollars a year approximately in 1955, and we have found out that it amounts to 88.6 per cent of all of du Pont sales to the automotive industry. We think that this is very important evidence to show the necessity for divestiture in this case.

We think also, as I said before, that we should be permitted to point out to your Honor the nature of the trade relations between them so that your Honor can frame injunctions, if that should be your desire.

That, your Honor, is our argument on the relevance.

Now, Mr. Tierney has also referred to the line of commerce argument, that if we introduce evidence with re- [fol. 532V] spect to any of these products, that he is going to have to go through and show the dollar volume and the quantity that General Motors buys, and that everyone else buys. We think that is entirely unnecessary. The line of commerce concept is relevant only in determining whether there is a violation of the law. Once the acquisition has been found to be unlawful, there is no purpose in discussing lines of commerce. The purpose of our motion or requests for admissions is merely to ascertain the general economic facts that are now applicable between General Motors and du Pont.

Mr. Tierney: Pardon me. You have the figures which have been furnished by the du Pont Company showing that General Motors buys X-million dollars worth. Now, do you want to find out how much bug killer we buy, and where it is used?

Mr. Reycraft: Your Honor, we have specified in our requests for admissions the products which we——

Mr. Tierney: Well, that——

The Court: Just a minute. One at a time. You will have a chance to reply.

Mr. Reycraft: Your Honor, we have specified in our request for admissions the products which we are reasonably certain are used in the automotive industry. We have gone to some trouble to be reasonably sure in our [fol. 532W] own minds, at least, that they are used in the

automotive industry. We think that if we show that du Pont sells particular products to General Motors, that the Court should consider it when injunctions are being considered, or if injunctions are being considered. We think we should also be permitted to supply this type of information to underscore what, in our opinion, is the necessary divestiture in this case.

We are not arguing with respect to any of these products, that we should have to show at this stage of the proceeding a tendency to monopoly or a substantial lessening of competition, or a restraint of trade. We don't think that that has a place in this hearing at this point. We are not going to question the conduct of any officials; we are not going to question the legality of any existing contracts. Our purpose is to show what the nature of the market is which is affected by this illegal relationship.

Now, I don't understand quite clearly from Mr. Tierney's remarks whether he thought that we were not available for a conference. In fact, on the Rule 36 motion I sent a draft of our motion to Mr. Tierney beforehand and suggested that it might be well for us to get together to discuss it. Now, for various reasons it didn't appear to be a feasible procedure. But the Government stood [fol. 532X] ready and does stand ready to do this.

Now, we have the same position on our Rule 34 motion. We don't wish to burden the parties unnecessarily, particularly at this stage of the proceeding, but we do think particularly, your Honor, we filed our memorandum on September 26th, I believe it was, and very shortly thereafter we started our discovery. Now, we don't think we should have been required to start discovery before all of the parties had made their positions clear. We think we are entitled to know what their positions were on the issues in this case before we started framing our discovery. But as we said in our brief, we would object strenuously to any extension of the hearing date, and we want to go forward on that date, and we are very anxious to limit our discovery in any way possible in order to meet that date.

Now, Mr. Tierney has made, I believe, seven objections. The relevancy we discussed. I suppose we discussed them all in a way. I don't think that the objection that there

is duplication with the du Pont motion is correct. Now, our request for admissions to du Pont was limited to products which du Pont makes. Our request for admission to General Motors seeks to determine the use of those products in General Motors products.

Now du Pont, of course, has no knowledge or a limited [fol. 532Y] knowledge of those facts.

That is our position.

Mr. Tierney: If the Court please, just one observation: The request for admission "A" which is filed here on January 13th requests this admission "each of the categories of materials or products listed below, and each of the materials or products listed under each category has been used by one or more divisions of General Motors Corporation at some time during the period January 1, 1955 and ending September 30, 1958."

You know that is not limited to products produced by du Pont, and "any of these materials that had been used."

Now, turning to Page 2, you get the first list, "Fabrics, yarns and fiber," and it lists from A to K. I can't pronounce them all—"vinyl plastic-coated fabric, rubberized fabric, synthetic rubber-coated fabric, tetrafluoroethylene resin-coated glass fabric, rayon fabrics, rayon tire cord." It goes down a complete list of some eighty-five products. And then back in Paragraph G they want to know if nylon resin has been used by one or more divisions of General Motors in the manufacture of products listed below during the period beginning 1-'55, and ending September, 1958. And then there is a list of some sixty-seven.

[fol. 532Z] Now, Mr. Hogan advises me and the people at General Motors advise me that they could not possibly get this information within less than nine to twelve months.

Now, those are the facts of life, your Honor. I have this other observation to make: I think it is a little unfair to this Court that the Government has not made its position very clear as to what the issues are here. They have said very definitely in that brief from which you read that they were not interested in these various lines of commerce. Now, unless they are going to show that there is a line of commerce here, when they already have the dollar figures as to what du Pont sells to General Motors, then I can't see any relevancy at all to it.

The Court: Does anybody else wish to be heard?

Mr. Reycraft: I have just one more brief observation to make, your Honor. I personally have some difficulty in seeing how nine months could be involved, although I have no doubt that if Mr. Tierney says that is true, that it would be. We would have no objection, for example, to having Mr. Tierney designate specific officials of General Motors, whether they be engineers or purchasing agents, if they know of their own knowledge that these things are used,—that would be acceptable to us. We think it would [fol. 532AA] be a relatively simple matter for a person such as the chief engineer of the Chevrolet Division to just run down the list and check these things off. We are not asking for quantities, and therefore there is no necessity whatever to look at vouchers or to go into the dollar amount of each of these particular products.

Mr. Tierney: Your Honor, there would be at least 390 persons that we would have to ask questions of. At each paying station we would have three persons.

Mr. Reycraft: Paying stations have nothing to do with it.

Mr. Tierney: How do you know that paying stations have nothing to do with it?

The Court: I think there is a basis for the objections, and I would suggest that you confer. Counsel has offered some additional documents here. I would suggest that you confer and see if you can agree on the form of an order that should be entered.

I doubt very seriously the relevance of the information requested to the remaining issues in this case. So the Court will recess for awhile and report to the Clerk when you are ready for the Court to come out.

(Whereupon a recess was taken in the hearing of the above-entitled cause to 2:00 o'clock of the same day, Monday, January 19, 1959.)

Mr. Reycraft: Your Honor, that is our position with respect to our judgment, and of course, it is based on the assumption that our judgment would be entered. Of course [fol. 532D] the fact is that defendants don't agree with our position, and we do feel that we have an obligation to prepare for any alternative relief which your Honor may wish to enter. We think that we should be in a position to discuss the alternative injunctions concerning trade relations. If the Court gives complete divestiture which we think the law requires, we don't think there will be any necessity for any type of trade relations injunction other than the type which we refer to in our memorandum.

The Court: May I interrupt to say that I neglected to state another thought that comes to my mind. This question of trade relations, of course, is fully covered in the evidence in trial of the case in chief. Now, it is possible —I don't know—but it is possible that defendants' counsel will stipulate that trade relations between them have not changed any, and are continuing as they were at the time the Court decided the case.

If that is true, would that simplify it?

Mr. Reycraft: Well, your Honor, that would simpl--y it to some extent. We have in mind also that the relations with suppliers would also be important in the event that your Honor would wish to enter injunctions rather than divestiture relief. We think that we should be in position to make recommendations to the Court on how suppliers [fol. 532E] would be affected by the decree. We don't think that a stipulation as to the continuation of trade relations as they existed at the trial would fully bring up-to-date these factors.

As I recall it, the last date on which there was complete annual dollar volume of purchases was 1947. Now, we have brought up-to-date the dollar volume of purchases from 1955 to date, but we do think that the nature of the trade relations is also important, and the identity of suppliers with whom the defendants deal might also be important in determining what relief should be entered.

The Court: Is there anything further?

Mr. Reycraft: Yes, your Honor, if I may.

I have given to du Pont last week a document which limits——

The Court: You modified your position somewhat, I think, from the original motion in your reply brief.

Mr. Reycraft: Your Honor, that relates to du Pont; the reference in our brief relates to General Motors. We have tried in each case to meet the reasonable objections that the parties have made, and of course would be ready to discuss further any limitations which would be necessary to eliminate burdensomeness.

The Court: Well, I will hear from the defense.

[fol. 532F] STATEMENT ON BEHALF OF DU PONT BY MR. COX

Mr. Cox: May it please the Court, I am here this morning to object to any further discovery on the part of the Government, and at the risk of trespassing a little bit on the Court's time, I should like to tell the Court exactly what has happened since we were here the last time at a pre-trial conference.

I am going to talk about what du Pont has done. Perhaps it would be more accurate to say what the Government has done to du Pont in that respect. But we began with a motion for the production of documents which was served on us in November.

Now, we have not objected to that motion, your Honor, and we are going to produce those documents that call for three or four or five categories of documents.

The Government then served notice on us to take the depositions of three witnesses about the trade relations between the companies. We produced those witnesses and they examined them, and in the course of that examination they served subpoenas duces tecum on us, and we did not object to those subpoenas. We produced several thousand pages of documents, and they examined them and took a lot of copies of a large number of pages.

They then served interrogatories on us under Rule 34, and we have answered those interrogatories.

[fol. 532G] Then on the 11th or 12th of January they gave us a very long Notice to Admit. That covered twelve main categories of commodities, and it was broken down into about 86 or 90 specific commodities. Now, that involved a great deal of work that we are doing, and we will do it, and we will finish it, and we will give it to the Government before the trial starts.

Now, after we have done all of that, they have come forward with another notice to produce. This, as our papers we file with the Court, will show, imposes a very heavy burden on the du Pont Company at this time, only a month before trial. The first item in that notice to produce would require us to review and examine about 100,000 pages of documents, and Mr. Reycraft's modification, unfortunately, doesn't really help us any, because while it limits what we have to produce, it doesn't limit the documents we have to examine in order to find what we have to produce.

The second paragraph in this new Notice to Produce would also impose a heavy burden on us because it requires us to produce all documents for three years of a specified kind, together with all similar periodic reports, which again would mean that we would have to make a very extensive file search in order to find these documents, even as they have been limited.

[fol. 532H] The third item which the Government asked for is a product index, and we have that here this morning, and we will give it to them.

Now, when this started, may it please the Court, while I had very grave doubts about the relevance of all of this, for the reasons that your Honor stated, it seemed to me better to go forward and give the Government, so far as I could, what it wanted, and Mr. Reycraft in his papers, has been handsome enough to admit that our compliance has been made in good faith. But unfortunately the reward of compliance is not apparently repose, but merely a demand for more, and I think the time has come when something should be done to curb what apparently is the insatiable appetite of Mr. Reycraft or his juniors for details that cannot be very important in this litigation.

We have only a month now before trial, and we should be allowed, I submit, to go ahead and prepare our case, and not be tangled up in these discovery proceedings.

The justification that Mr. Reycraft makes for this discovery is not substantial. Your Honor has pointed out, in reference to the injunctive provisions in his brief, reduces the area within which he really is entitled to inquire about anything. He attempts to justify it also on the ground it [fol. 532I] has some relevance to whether there should be divestiture. But I suggest to your Honor that there is a very

easy test of that argument. If I came into this Court and said to your Honor, "Now the Govern[illegible]ent has a plan here, and we have a plan here, and you ought to take our plan and not the Government's plan, and the reason you should take our plan is because of a lot of evidence that I would like to present to your Honor that has to do with plastics and synthetic fibers and chemicals and things of that kind, and doesn't have anything to do with fabrics and finishes, but if you will just listen to this evidence that has to do with these other commodities, I can convince you that the Government's plan should be rejected," I know what Mr. Reycraft would say to that, and I think I know what this Court would do.

This question of whether there should be a divestiture of the vote and influence of the stock, or divestiture of this abstract ownership in which the Government seems to be interested, is not a question that is going to turn on these other commodities.

The final point that I want to make to your Honor—and I want to emphasize this—is that all of this from this point on is unnecessary because of the discovery we have given Mr. Reycraft; he has everything he needs. He has the sales [fol. 532J] figures, and he knows that du Pont is now making things that are used in the automobile industry, and he knows that du Pont apparently sells to General Motors, who sells to suppliers, who sell to General Motors, that sells to fabricators, and who sell to suppliers, who sell to General Motors—they got all of that, may it please the Court, in these depositions, and in these documents.

Mr. Reycraft does not explain, to my mind, in any sense what it is that he now needs that we have not already given him, and I suggest, your Honor, with great earnestness, that the time has come to stop this thing, both as to du Pont, and if I may trespass upon Mr. Tierney's prerogative, I think also as to General Motors. The Government has now had everything it needs and has failed to show good cause for getting anything more.

STATEMENT ON BEHALF OF GENERAL MOTORS BY MR. TIERNEY

Mr. Tierney: May it please the Court, so far as the motions to produce which have been served on General Motors, we have furnished a considerable number of documents, and

we have some other documents that we propose to give the Government. I don't think we are going to have any quarrel with the Government on the motion to produce.

The Court: Does the Government know which docu-
[fol. 532K] ments you intend to turn over?

Mr. Tierney: We have some that we are ready to give them today. We have complied with those, so far as we can, both the first motion that was filed, and with the two motions to produce. I think we will have no difficulty working it out with the Government, in response to those.

The Court: Well, the Court will recess for awhile and suggest that counsel confer among themselves. In view of the fact that the Government doesn't know——

Mr. Tierney: These are very few documents. I do want to make this clear. Our quarrel this morning is with this long request for admissions of fact. We are not trying to be obstructive, your Honor, but our study of this and what the folks at Detroit have found, is we could not comply with this as request for admissions, short of nine months to a year. There is just no doubt about it. We just cannot comply with it, and it all seems so unnecessary because it seemed to me the issues were pretty well defined here before your Honor. The Government made its proposal for divestiture, and du Pont made its proposal, and the amici made their proposal, and, as your Honor has pointed out, the question on trade relationship is really not before this Court.

Now, then, if we are compelled *with* comply with this [fol. 532L] request for admissions, it will just take that much time. For example, your Honor, there are 130 paying stations that General Motors have. There would have to be an investigation at all of those 130 paying stations to find out whether we use some of these products, whether they use them there. You will get one answer and you will have to follow it up with further answers to find out. Someone would have to be hired from the outside for that purpose, to make a complete investigation.

For example this runs—as you know, there are some 85 or 86 products, and they have some 180 end uses that they want to know about.

Now, one further observation: We think that the Supreme Courty pretty well defined the issues in this case, so far as your Honor is concerned. They said that, in

their opinion, "For the purpose of this case, the line of commerce is automotive finishes and fabrics."

Now, they won that case. All of the evidence has been before the Supreme Court, and they have held that that is the line of commerce for the purposes of this case.

Now, if we have to go into all of these other things, suppose we do use some of these products; suppose we do use all of these products; do we buy them all from du [fol. 532M] Pont? What percentage of them do we buy from other competitors? If any part of this evidence is admitted in this record which would permit an unfavorable inference, we are entitled to show the other side of the coin to dissipate or obviate that inference, and if we have to make these admissions, we will have to be able to show the whole picture—not part of it, but the whole picture—and I say to your Honor, in order to do that it would take us nine months.

Now, so far as any conference with the Government counsel on the question of admissions is concerned, we just cannot get anywhere with them. On the question of answering these interrogatories or producing these documents, we just cannot get anywhere on the request for admissions; on the production we have those, and I think it will satisfy them.

I want to make myself clear this morning, that so far as our position is concerned, we just cannot comply with these requests for admissions outside of nine months to a year.

Now we object to these requests for admissions for the following reasons:

1, the facts requested are not relevant to the issues before this court;

2, inasmuch as the request raises issues which heretofore [fol. 532N] have not been raised, preparation to defend against such issues could not be completed within the time remaining before hearings;

3, the request was filed so late that it would not be possible for General Motors Corporation to respond thereto within the time remaining before hearing;

4, the request is unduly burdensome;

5, General Motors should not be put to the burden of duplicating irrelevant admissions which du Pont will make and which General Motors will concede to be correct.

As Mr. Cox said, he had no doubt as to the irrelevancy of the matters, but it was easy for them to comply in the hope that we could get on and get this case disposed of. We say they are irrelevant, but we cannot comply with such ease. It is going to take us all of that time to do it.

6, the request is contrary to the Court's ruling that all discovery is to be completed 30 days before the hearing;

7, Paragraphs T and U of this request are contrary to this Court's ruling that the Government shall not inquire into the plans of General Motors Corporation for the future use of products.

I don't want to prolong this, your Honor, but I would like to call your attention to what, as you may recall, the [fol. 532O] issues are here.

Now the Government's proposed decree would require du Pont to divest itself of its holdings in General Motors stock. Du Pont's proposal would substitute a series of injunctions restraining du Pont's right to intervene in the management of General Motors through its stock ownership. Amicus Cowen proposed a similar series of injunctions restraining du Pont and Christiana from voting their General Motors stock or otherwise attempting to exercise any control over General Motors.

Amicus Dallstream's proposal includes a similar series of injunctions, and also suggests a plan whereby a du Pont stockholder may obtain part or all of his pro rata shares of General Motors stock held by du Pont. And inasmuch as all of the proposed decrees are directed at the incidence of stock ownership rather than at the commercial relations between du Pont and General Motors, an inquiry into such relations is not relevant to a determination of the proper relief.

So we have the Court's limitation; we have the limitation by reason of the proposals that have been filed; we have the Government's position which you have read this morning which came from their previous brief, so in addition [fol. 532P] to being burdensome, this whole matter is irrelevant, and we think that under Rule 36 and the cases, that your Honor should deny this motion or request when it comes before you.

The Court: What documents do you have now that you say——

Mr. Tierney: We have the Minutes and the Table of Stockholders showing the stockholder relationships, and that is about all we have produced. With that, we will have produced all we have in response to the motions to produce.

The Court: Does anybody else wish to be heard for the defense?

If not, I will hear from Mr. Reycraft.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Reycraft: Your Honor, the fact is that du Pont has given us substantial compliance, and we are quite surprised to hear, in fact, that Part I of our request to them would involve anything like an extensive file search. We refer specifically in Paragraph I to reports which we have seen copies of, and which are readily identifiable, so it seems to us. We don't know whether some limitation should be made to the files by office or by division of du Pont. We would have no objection to a limitation such as that, but we cannot know the nature of du Pont's files and their organization without information from counsel.

[fol. 532Q] As far as Part II of our request to du Pont is concerned, our understanding is that these reports, they are monthly reports. We talk about three years—there can be no more than thirty-six of these reports. So several of them or many of them, perhaps, were produced in——

The Court: Reports on what?

Mr. Reycraft: Monthly Report Summary, Industrial Sales Development, Textile Fabric Department, Sales Service Division.

The Court: Is this your request to General Motors?

Mr. Reycraft: To du Pont, sir.

The Court: To du Pont?

Mr. Reycraft: Yes, sir.

The Court: Well, was that furnished?

Mr. Reycraft: No, sir, not this part.

The Court: Are you objecting to that part, Mr. Cox?

Mr. Cox: Yes, we are objecting to this, may it please the Court, on the ground that this will be quite burdensome to us now and involve an extensive file search, and we think that general information of the kind is in these reports that Mr. Reycraft now has. He saw similar documents.

Mr. Reycraft: Your Honor, we saw several such reports, [fol. 532R] and we are asking for a complete set by month of these reports. I believe there are thirty-six of them. When we took the deposition of the gentleman from du Pont, some of these reports were in their files, and of course they produced them.

The Court: What do these reports refer to?

Mr. Reycraft: They refer to sales by du Pont of products of this type to the automotive industry, and there are thirty-six of them, I believe, your Honor, and if I am wrong about that, I would appreciate being corrected.

Mr. Cox: I think Mr. Reycraft overlooked one thing in his request. This is Paragraph II. He says, "all documents for the years 1956, '57 and '58 entitled 'Monthly Summary'—'Monthly Report Summary, Industrial Sales'" and so forth, and then he gives the title, and then he says "or similar periodic reports of the same departments referring or relating to the use of du Pont textile fibers and fabrics in the automotive industry."

Now——

Mr. Reycraft: We don't object to eliminating that, Your Honor. We think the specific reports we have identified will be satisfactory.

The Court: Well, that doesn't appear to me to be too difficult to get, thirty-six reports.

[fol. 532S] Mr. Cox: Well, if we can eliminate 'similar periodic reports,' there will be only twelve of these, because these reports were not made in 1957 and 1958. That is the difficulty about the similar periodic reports, as far as this paragraph is concerned.

Mr. Reycraft: Well, your Honor, it seems to me that if this report has been discontinued and replaced by a specific report, if it has been discontinued and it can be readily identified, the fact that we don't know the title of it should not preclude it. If there are thirty-six monthly reports, it seems to me it is a simple enough task for them to be furnished.

Mr. Cox: I don't believe there are any——

Mr. Reycraft: If there are none, well, of course, that answers the question.

Mr. Cox: Now, in the first paragraph of this request, your Honor, they want all of these reports referring or

relating to the use by General Motors of fabrics or fibers manufactured by du Pont, or the use by suppliers of General Motors of fabrics or fibers manufactured by du Pont and the manufacture of the fabrics or part sold or to be sold to General Motors.

Now, we would have to examine every report and refer to any one of a very large number of customers, because each one of those customers may, himself, sell to General [fol. 532T] Motors or sell to someone who does. We have had a preliminary look at that, and that is the one that would require the examination of 100,000 sheets of paper.

Mr. Reycraft: Your Honor, we don't want du Pont to examine 100,000 sheets of paper. We wish to be clear on that subject. We have identified these reports specifically, "Textile fibers, department sales service report." These are reports which du Pont employees regularly make, and if there is some way that we can limit them, we are glad to do that, your Honor, but we cannot know what du Pont's files show, how they are organized, and——

The Court: Well, I think you can work out something by agreement with Mr. Cox on that.

Mr. Reycraft: Well, we have certainly tried to.

The Court: Now, what about Mr. Tierney's statement with reference to these requests for admissions, that it would take nine months to get, and also the relevancy of it?

Mr. Reycraft: Well, our purpose in doing this in the form of Request for Admissions is that we sincerely believe that any executive of General Motors—for example, the purchasing agent for the Chevrolet Division—can go down this list, and he could check off the products which is division uses, and the uses which they have.

Now, we don't think that it is going to be necessary to go through 130 paying stations. We specifically avoided [fol. 532U] in our interrogatories asking for breakdowns of sales by products.

You will recall when we were here before, counsel told us that this would be a very difficult task.

The Court: All right, will you explain the relevancy of this request?

Mr. Reycraft: Yes, sir. It is the same argument we made to your Honor before. We think that we should

[fol. 532BB] Before Judge Walter J. LaBuy.

Monday, January 19, 1959, 2:00 p.m.

Proceedings resumed pursuant to recess.

[fol. 532CC] The Clerk: No. 49 C 1071, U. S. vs. E. I. du Pont de Nemours, motion for entry of order.

AGREEMENT OF COUNSEL AND APPROVAL BY COURT

Mr. Burnham: Your Honor, over the noon hour counsel did confer and we have presented a form of order which disposes, I believe, of all outstanding objections and motions with respect to discovery.

Mr. Reycraft: Your Honor, we think the form of the order does accurately reflect your Honor's ruling, and as to paragraph 3, of course we still object. This is the request for admissions to General Motors. But we do think it reflects your Honor's ruling.

The Court: Very well, the order is signed.

[fol. 532DD] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 533] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ORDER WITH RESPECT TO DEPOSITIONS—January 19, 1959

At Chicago, Illinois, in said division and district, on January 19, 1959.

This cause coming on to be heard on the several motions of the Government to require E. I. du Pont de Nemours and Company and General Motors Corporation to produce certain documents, upon the objections thereto, and upon the objections of General Motors Corporation to the Government's request that it admit certain facts, the Court

having considered the briefs filed herein upon said motions and objections, having heard the arguments of counsel thereon and being fully advised in the premises,

It Is Hereby Ordered:

(1) The motion of the Government that General Motors [fol. 534] Corporation produce certain documents, which motion contains four numbered paragraphs and was served upon General Motors Corporation on or about the 28th day of November, 1958, is granted, except that General Motors Corporation need not produce, in response to paragraph 2 thereof, any studies or reports which were prepared for use of counsel in preparation for the hearing in this cause. The documents required to be produced by this order shall be furnished to Government counsel on or before Monday, January 26, 1959.

(2) The motion of the Government that General Motors Corporation produce certain documents, which motion was served upon General Motors Corporation on or about December 11, 1958 and which motion was modified to substitute for paragraph numbered 1 thereof the paragraphs numbered 1 and 2 which appear at [illegible] of the Government's reply brief in support of said motion, is granted as so modified. The documents required to be produced by this order shall be furnished to Government counsel on or before Monday, January 26, 1959.

(3) The objections of General Motors Corporation to the Government's request that General Motors Corporation admit certain facts, which request was served upon General Motors Corporation on or about the 13th day of January, 1959, and which objections were stated in open Court by counsel for General Motors Corporation on January 19, [fols. 535-536] 1959, are hereby sustained. General Motors Corporation need not respond to said requests for admission.

(4) The Government's motion with respect to du Pont under Rule 34 dated November 28, 1958 is hereby granted except that du Pont shall not be required to produce any study or classification prepared by it for use in this litigation.

(5) As to the Government's motion with respect to du Pont to produce under Rule 34 dated December 11,

1958, as modified, paragraph 1 of the motion is withdrawn; paragraph 2 of the motion is granted, except that the plaintiff has withdrawn the words "or similar periodic reports of the same department referring or relating to the use of du Pont textile fibers and fabrics in the automotive industry;" and paragraph 3 is granted.

Enter:

/s/ Walter J. La Buy, District Judge.

January 19, 1959.

[fol.537] [File Endorsement Omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION OF CHRISTIANA SECURITIES COMPANY, ET AL TO STRIKE PORTIONS OF GOVERNMENT'S PROPOSED FINAL JUDGMENT—Filed January 20, 1959

Defendants Christiana Securities Company ("Christiana") and Delaware Realty and Investment Company ("Delware") move the Court to strike, and to eliminate from further consideration in this action, the following portions of the proposed Final Judgment submitted by the United States in response to the Court's order of September 25, 1957:

1. The words "the defendants" and "Christiana and Delaware" in Subparagraph (D) of Article II.

2. So much of Article III as would (a) order and direct Christiana and Delaware to convey to a trustee certificates [fol. 538] representing all the General Motors stock held by them at the time of the entry of the Final Judgment, and (b) order Christiana and Delaware to give to the trustee information from time to time concerning the names, addresses and number of shares held by their stockholders.

3. So much of Article IV as refers to Christiana and Delaware.

4. The last thirty words of Article V, to wit: "and a proxy

to vote a pro rated amount of the General Motors stock deposited by Christiana and Delaware with the trustee which is at such time undistributed and unsold."

5. The words "other than Christiana, Delaware and the stockholders of Delaware," in the first sentence of Article VI, and the entire second sentence of Article VI.

6. All of Article VII.

7. So much of Article VIII as refers to Christiana and Delaware.

8. The words "Christiana, or Delaware" in the first sentence of Article X, and so much of the second sentence of Article X as would enjoin Christiana and Delaware from having as a director or officer any director or officer of General Motors.

9. So much of Article XII as includes Christiana and Delaware within its scope.

[fol. 539-575] The motion is made on the grounds that the above-cited portions of the Government's proposed Final Judgment would exceed the powers of this Court by adversely affecting the legal rights of Christiana and Delaware without basis in any findings of this Court of in the decision of the Supreme Court, and further would result in a denial to these defendants of due process of law in violation of the United States Constitution.

Howard Ellis, Kirkland, Ellis, Hodson, Chaffetz & Masters, Prudential Plaza, Chicago 1, Illinois, Wilkie Bushby, Philip C. Scott, Leonard Joseph. Dewey, Ballantine, Bushby, Palmer & Wood, 40 Wall Street, New York 5, New York. Attorneys for Defendants, Christiana Securities Company and Delaware Realty and Investment Company.

January 20, 1959

[fols. 576-1114] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[File endorsement omitted]

[Title omitted]

MOTION OF UNITED STATES TO STRIKE FROM THE RECORD DEFENDANT DU PONT'S EXHIBITS 16 THROUGH 18 AND 21 THROUGH 26 AND THE TESTIMONY OF WITNESS TEPPING BASED ON THESE DOCUMENTS—Filed April 9, 1959

Comes now the United States, plaintiff in the above entitled action, by its attorneys, and respectfully requests that the Court strike from the record defendant du Pont's Exhibits 16 through 18 and 21 through 26 and the testimony of witness Benjamin Tepping based on these documents, for the reasons stated in the attached Memorandum.

s/ George D. Reycraft, Attorney, Department of Justice.

Dated: April 9, 1959.

[fols. 1115-1120] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ORDER DIRECTING FILING OF PLAINTIFF'S PROPOSED FINAL JUDGMENT, ETC.—June 26, 1959

This matter coming on to be heard on the motion of the plaintiff to clarify and correct the record, and the Court, finding that all parties have been informed of the motion, and being fully advised in the premises,

It Is Hereby Ordered that:

1. The proposed "Final Judgment" which the plaintiff submitted on October 25, 1957 pursuant to the order entered on September 25, 1957 shall be marked filed as of October 25, 1957.

2. The Trial Brief and Request for Findings of Fact and Conclusions of Law filed by the plaintiff on May 11, 1959

(which are marked on the cover page "Corrected Copy") shall be substituted for the Trial Brief and Request for Findings of Fact and Conclusions of law which the plaintiff filed on April 29, 1959.

Enter:

s/ Walter J. La Buy, United States District Judge.

June 26, 1959.

[fol 1121] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1071

UNITED STATES OF AMERICA, Plaintiff,

E. I. DU PONT DE NEMOURS AND COMPANY; GENERAL MOTORS CORPORATION; CHRISTIANA SECURITIES COMPANY; AND DELAWARE REALTY & INVESTMENT CORPORATION, Defendants

[fol. 1122] To the Honorable Walter J. La Buy, Judge of the United States District Court for the Northern District of Illinois, Eastern Division:

The undersigned, heretofore appointed as amicus curiae with respect to the interests of the stockholders of E. I. du Pont de Nemours and Company, respectfully submits herewith (i) a special report upon the status of the tax rulings requested from the Commissioner of Internal Revenue in compliance with the order of this honorable Court entered on August 8, 1958, with respect to the so-called "take-down" provisions of the Proposed Judgment submitted by the undersigned, (ii) the amended form of Proposed Judgment referred to in the special re-[fol. 1123] port, and (iii) such exhibits relative to the application for and the securing of said tax ruling as it is believed will advise the Court in the premises.

Respectfully submitted, /s/ Andrew J. Dallstream, Amicus Curiae, 231 South LaSalle Street, Chicago 4, Illinois, CEntral 6-4500.

Dated: September 29, 1959.

[fol. 1124] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

SPECIAL REPORT OF ANDREW J. DALLSTREAM, AMICUS CURIAE, WITH RESPECT TO STATUS OF TAX RULING PERTAINING TO THE DALLSTREAM PROPOSED FINAL JUDGMENT

Pursuant to the order of this Court entered August 8, 1958 the undersigned, with the cooperation and assistance of other parties to this proceeding and Amicus Cowen, prepared a request directed to the Commissioner of Internal Revenue for a ruling with respect to the Federal Income Tax consequences that would flow from the entry of the undersigned's Proposed Final Judgment submitted by the undersigned with his August 1958 report and from the operation of the so-called "take-down" program contained [fol. 1125] in Article VIII thereof.

Such request, dated September 25, 1958, was delivered to the appropriate officers in the office of the Commissioner of Internal Revenue at a preliminary conference held in Washington on that date.

The request as filed did not advocate a particular set of conclusions, but merely asked the Commissioner of Internal Revenue to indicate what tax results would follow upon the entry of such judgment. Subsequently, the Commissioner required that the parties seeking the ruling indicate to him the particular interpretations which they believed were correct and file a brief in support of such position.

In this connection, a series of proposed rulings which the Amici Curiae and other parties to the proceeding believed were correct, were submitted to the Commissioner on October 20, 1958, along with a brief in support of the conclusions submitted.

Subsequently, the Commissioner of Internal Revenue expressed a tentative conclusion at variance with one of the important issues raised by the requested ruling, and a special conference was held in Washington, D. C. to discuss this issue. Subsequently, the undersigned made certain amendments to his Proposed Final Judgment in order to meet certain objections raised by the Commissioner at such [fol. 1126] conference, and, under date of March 4, 1958,

submitted an amended Proposed Final Judgment together with an additional brief.

On July 8, 1959, the Commissioner of Internal Revenue issued a ruling letter addressed to the defendant E. I. du Pont deNemours & Co. on the Dallstream Proposed Final Judgment, a copy of which ruling letter is attached hereto and filed herewith. The rulings which the Commissioner issued differed in certain important respects from the rulings which had been requested. It is the purpose of this supplemental report to point out these differences.

I

Summary of Ruling as Requested and as Issued

A. *Theory of Ruling as Requested.* The Commissioner was asked first to rule that the exchange of old duPont Common for new duPont Special Common was not in substance an exchange at all, but was merely a mechanical device adopted to indicate, by the variation in the form of the outstanding certificates, which shareholders of duPont had received their allocable portion of the GM stock and which had not, or, in the alternative, to rule that the exchange of old Common for Special Common constituted a tax-free recapitalization exchange and that the [fol. 1127] accompanying distribution of GM shares was not made as a part of the reorganization exchange of stock for stock but was legally a separate ordinary dividend distribution in kind.

The Commissioner was asked second to rule that the receipt of the GM stock by a duPont stockholder pursuant to the "take-down" program was to be treated as an ordinary dividend for all purposes, subject to all of the normal rules contained in the tax law applicable to the receipt of ordinary dividends.

B. *Theory of Ruling as Issued.* In the ruling which actually issued, the Commissioner, on the first point stated above, rejected the first alternative and held that the exchange of shares of duPont Common stock for shares of Special Common stock would be treated as a tax-free recapitalization reorganization of duPont. He went on to also reject the alternative contention, and held that the distribution of GM stock by duPont would not be an ordi-

nary dividend separate from the exchange of new Special Common for old Common, but would be part of the reorganization exchange, and that, consequently, the receipt of GM stock pursuant to a "take-down" would be taxed as a "boot" dividend in connection with a reorganization exchange under the special rules contained in Section 356 (a) (1) and (2) of the Internal Revenue Code, and not as an ordinary dividend.

[fol. 1128] The Commissioner went on to rule further with respect to the second contention referred to above that amounts treated as dividends by reason of Section 356 (a) (1) and (2) of the Code would not be eligible for the credit, exemption and deduction provided by Sections 34, 116 and 243, respectively, of the Code.

C. *Difference in the Tax Effects between the Ruling as Requested and the Ruling as Issued.* The differences between the tax ruling which was requested and that which was issued by the Commissioner can best be illustrated by taking a hypothetical situation. For the purposes of the illustrations set forth in parts II and III hereof, it has been assumed that a stockholder has one share of du Pont Common stock with a cost to him of $120. Assume further that the fair market value of one share of du Pont Common stock is $240, that the value of the underlying GM stock when distributed will be $60, and that the value of the new du Pont Special Common which will be issued in exchange for the du Pont Common will be $180.

[fol. 1129

II

Tax Effects which would have Followed under the Ruling as Requested

A. Present Holder Takes Down and Ultimately Resells Both the GM and the New du Pont Special Common

	Non-Corporate Holders	Corporate Holders
1. Take-Down (Immediate Tax)		
Amount of Dividend in GM	$ 60.00	$ 2.10
Tax Rate Thereon	20% to 91% (but subject to reduction by exclusion and credit)	4.5% to 7.8%
Tax	$12 to $54.60 (but subject to reduction by exclusion and credit) $30 (assumed average tax)	$0.16 (after 85% credit)
Tax on receipt of new du Pont Special	None	None
2. GM Sale (Deferred Tax)		
Proceeds	$ 60.00	$ 60.00
Basis	60.00	2.10
Gain	None	57.90
Tax on Gain	None	14.47 (C. G. Rate)
3. Special Common Sale (Deferred Tax)		
Proceeds	$180.00	$180.00
Basis	120.00	120.00
Gain	60.00	60.00
Tax on Gain	15.00 (C. G. Rate)	15.00 (C. G. Rate)

[fol. 1130]

	Non-Corporate Holders	Corporate Holders
4. Total Tax Cost (Immediate and Deferred)		
Dividend Tax	$ 30.00 (assumes 50% effective rate)	$ 00.16
Tax on GM Sale	None	14.47
Tax on Sale of Special Common	15.00	15.00
Total	$ 45.00	$ 29.63

B. Outsider Buys Old du Pont Common Stock, Takes Down and Ultimately Resells the GM and the New du Pont Special Common

1. Effect of Sale of Old Common on Former Holder

Proceeds	$240.00
Cost	120.00
Gain	120.00
Tax	30.00

	Non-Corporate Holders	Corporate Holders
2. Effect of Take-Down on New Holder (Immediate Tax)		
Amount of Dividend in GM	$ 60.00	$ 2.10
Tax Rate	50% (assumed average)	7.8%
Tax	$ 30.00	$ 0.16
3. Effect of Sale of GM Stock (Deferred Tax)		
Proceeds	$ 60.00	$ 60.00
Basis	60.00	2.10
Gain	None	57.90
Tax on Gain	None	14.47
4. Effect of Sale of du Pont Special Common (Deferred Tax)		
Proceeds	$180.00	$180.00
Basis	240.00	240.00
Loss	(60.00)	(60.00)
Tax Saving	(15.00)	(15.00)

[fol. 1131]

	Non-Corporate Holders	Corporate Holders
5. Total Tax Cost to New Holder (Immediate and Deferred)		
Tax on receipt of GM	$ 30.00	$ 0.16
Tax on sale of GM	None	14.47
Tax saved on sale of Special Common	(15.00)	(15.00)
Net Tax (after deferred saving)	15.00	0.37

III

Tax Effects under Rulings Issued

A. Present Holder Takes Down and Then Sells the GM and the New du Pont Special

1. Tax on Take-Down (Immediate Tax)

Value received on reorganization:

GM	$ 60.00
du Pont Special	180.00
Total	240.00
Basis of old stock surrendered	120.00
Gain realized	120.00
Portion of gain recognized[1]	60.00

[1] The gain recognized is the lesser of the gain realized or the fair market value of the GM stock received (60 is less than 120).

Tax on recognized gain:

	Non-Corporate Holders	Corporate Holders
Rate	54% (Assumed Average)	52%
Tax	$ 32.40	$ 31.20

2. Tax on Sale of GM (Deferred Tax)

Proceeds	$ 60.00	$ 60.00
Basis	60.00	60.00
Gain	None	None
Tax	None	None

[fol. 1132]

3. Tax on Sale of du Pont Special Common (Deferred Tax)

	Non-Corporate Holders	Corporate Holders
Proceeds	$180.00	$180.00
Basis	120.00[1]	120.00
Gain	60.00	60.00
Tax	15.00	15.00

4. Total Tax Cost (Immediate and Deferred)

Tax on Take-Down	$ 32.60	$ 31.20
Tax on Sale of GM	None	None
Tax on Sale of Special Common	15.00	15.00
	47.60	46.20

[1] The basis of the du Pont Special Common is equal to the basis of the old du Pont Common plus the value of the GM stock received minus the gain recognized. (120+60−60=120).

B. Present Holder Sells Old du Pont Common, Buyer Takes Down, and Buyer Resells GM and du Pont Special Common

1. Tax on Sale by Present Holder

Proceeds	$240.00	$240.00
Basis	120.00	120.00
Gain	120.00	120.00
Tax	30.00	30.00

2. Tax on Buyer on Take-Down (Immediate Tax)

Value received on reorganization:		
GM	$ 60.00	$ 60.00
du Pont Special	180.00	180.00
Total	240.00	240.00
Basis of stock surrendered	240.00	240.00
Gain realized	None	None
Gain recognized	None	None
Tax	None	None

3. Tax on Sale of GM (Deferred Tax)

Proceeds	$ 60.00	$ 60.00
Basis	60.00	60.00
Gain	None	None
Tax	None	None

[fol. 1133]

	Non-Corporate Holders	Corporate Holders

4. Tax on Sale of du Pont Special Common (Deferred Tax)

Proceeds	$180.00	$180.00
Basis	180.00	180.00
Gain	None	None
Tax	None	None

5. Total Tax Cost to Buyer on Take-Down and Sales

None	None

It should be explained that in all of the above tax computations, all gains (or losses) on sales are computed at the long-term capital gain ceiling rate. If a dealer in securities were the purchaser from the original holder, he would, by putting the old du Pont Common and the GM and new du Pont Special Common when received in an inventory account, have ordinary gain (or loss) on resales thereof.

Dividend taxes for non-corporate holders have been computed at an assumed average rate of 54% (before the 4% credit, where available). Corporate dividend taxes have been computed at a 52% rate (after the 85% deduction, where available).

A supplemental request was prepared and presented to the Commissioner asking that he reconsider his position and modify the ruling as issued to correspond with the ruling as originally requested. A hearing on such request was held in Washington and the Commissioner's staff advised that on [fol. 1134] the question of whether the GM distribution would be an ordinary dividend or a "boot" dividend in connection with a recapitalization, the staff would be adamant. The undersigned is advised by tax counsel that this is an area where the determination of the law applicable to the facts at hand involves the exercise of considerable discretion on behalf of the Commissioner and it is most unlikely that he would modify this portion of his ruling. A strenuous effort was made to persuade the Commissioner to recede from his position that the recipients of so-called "boot" dividends would not be entitled to the dividend credit, exclusion and deduction provided by Section 34, 116 and 243, respectively, of the Code. In this connection, the tax rulings branch of the Commissioner's office indicated that it is bound to issue ruling letters in accordance with existing treasury regulations. Although the authoritative case law holds to the contrary, the tax rulings division purports to find statements in the Commissioner's regulations under Sections 34 and 243 which force them to stand by the position taken in the ruling. Since the regulations do not seem to so provide, the undersigned will file with the Commissioner of Internal Revenue and with the appropriate branch of the Department of the Treasury a [fol. 1135] request for a clarifying amendment to the regulations, so as to make it clear that the intercorporate deduction would be available to corporate stockholders and that the dividend exclusion and credit would be available to noncorporate stockholders who are permitted by the Court to take down.

[fol. 1136] IV

Economic Significance of the Tax Ruling

Under the ruling as requested, existing corporate holders could have exercised the take-down privilege and ultimately resold the GM shares and the du Pont Special Common at considerably less cost than other holders. Under the ruling as issued, the discrepancy between the tax cost to corporate

holders and other holders has been largely eliminated. However, if the ruling is modified so as to give corporate holders the benefit of the 85% dividends received deduction the difference in favor of corporate holders will be reinstated. The really significant differences between the ruling as requested and the ruling as issued are found in the treatment of a new holder who purchases from an existing holder prior to take-down and who takes down himself, and in the treatment of an existing holder who has a high cost so that his gain will be less than the value of the GM stock received on take-down. In the case of an individual who dies, his estate will be in the same position as a purchaser with a new cost basis.

Under the ruling as requested, a corporate purchaser which is not a dealer in securities could purchase from an [fol. 1137] existing holder and ultimately resell the new paper take-down at a negligible tax cost, a corporate dealer in securities could purchase, take down and resell at an actual profit after taxes, and non-corporate purchasers who take down and ultimately resell would incur a very substantial tax cost.

Under the ruling as issued, any purchaser, corporate or non-corporate, can purchase from an existing holder and can take down without any tax whatsoever and can resell without any tax whatsoever (other than a tax on subsequent appreciation in value). Thus, under the ruling that has been issued by the Commissioner of Internal Revenue, holders of du Pont Common stock whose income tax cost basis for the stock is high in relation to the market value would "take down" at a relatively low tax cost. Of course, new purchasers, who will have a basis equal to the market value of du Pont Common at time of take-down would be able to take down without any tax cost. In addition, since, upon the death of an individual stockholder, the tax basis would be "stepped up" to market values on the date of death, every estate of a deceased stockholder could forthwith take down with no tax; consequently, it is likely that a major portion of the General Motors stock owned by individuals would be taken down over the course of one generation.

[fol. 1138] Another advantage that the take-down plan would offer is that present stockholders who wanted to sell their du Pont stock would not be faced with the arti-

ficially depressed market that would result if tax liability were hanging over the heads of prospective purchasers. Since prospective purchasers would have the right to apply for take-down and would suffer no tax consequences, it is clear that the market for du Pont stock would not be depressed by the entry of a judgment containing the take-down provisions.

Another potential source of take-downs that would accelerate the process of distributing the General Motors shares out of du Pont would be the activity of arbitrageurs. As the testimony at the hearing indicated, under certain market conditions it would be advantageous to security dealers engaging in arbitrage transactions to buy du Pont Common and simultaneously to sell du Pont Special Common and General Motors, which sales will be covered by exercising their take-down privileges. The tax ruling issued by the Commissioner of Internal Revenue would not lessen but probably increase the likelihood of arbitrage transactions as testified to at the hearing.

V

Amendment to Proposed Final Judgment

On the basis of conferences held with the staff of the [fol. 1139] Internal Revenue Service, the undersigned felt that in order to obtain a favorable tax ruling it was desirable to amend his Proposed Final Judgment in certain minor respects. In addition, the Commissioner of Internal Revenue requested in his ruling letter that a further amendment be made to the Proposed Final Judgment. The undersigned has therefore amended his form of Proposed Final Judgment and herewith submits the same to the Court.

VI

Submission of Additional Exhibits

In addition to the amended Proposed Final Judgment, there is submitted herewith the following exhibits:

Request for Tax Ruling dated September 25, 1958;
Specific Rulings Sought and Brief in Support Thereof, dated October 20, 1958;

Letter of March 4, 1959, and Supplemental Brief;

Tax Ruling of Commissioner of Internal Revenue dated July 8, 1959;

Request for Reconsideration of Tax Ruling dated August 12, 1959.

[fol. 1140] Letter from Commissioner of Internal Revenue dated September 23, 1959.

Respectfully submitted, /s/ Andrew J. Dallstream, Amicus Curiae.

September 29, 1959.

[fol. 1141] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

AMENDED PROPOSED JUDGMENT BY ANDREW J. DALLSTREAM, AMICUS CURIAE

At Chicago, Illinois, in said Division and District on ——, —, 19 —.

Plaintiff having filed its complaint herein on June 30, 1949, and its amendments thereto on July 28, 1952 and January 16, 1953; all of the defendants having appeared and severally filed their answers to the amended complaint denying the substantive allegations thereof; this Court, on January 16, 1953, before the conclusion of the presentation of the plaintiff's case, having entered an order dismissing with prejudice the amended complaint as to certain individual defendants, and on February 16, 1953, at the close [fol. 1142] of the plaintiff's case, having entered an order dismissing without prejudice the amended complaint as to certain additional individual defendants, and on December 9, 1954, after trial, having entered a judgment herein dismissing this action as to all defendants; the plaintiff having appealed in certain respects from such judgment insofar as it applies to defendants E. I. du Pont de Nemours and Company, General Motors Corporation, Christiana Securities Company and Delaware Realty and Investment Com-

pany; the Supreme Court of the United States having reversed so much of such judgment as held there was no violation of Section 7 of the Clayton Act by defendant E. I. du Pont de Nemours and Company, and having remanded this cause to this Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects offensive to the Clayon Act; this Court having held further hearings pursuant to the decision of the Supreme Court of the United States and having issued findings of fact on ————————; the Internal Revenue Service having ruled on July 8, 1959, as to the Federal Income tax consequences of carrying out the provisions of this Judgment ~~including, among other things, a ruling that no income will be recognized to the stockholders of defendant E. I. du Pont de Nemours and Company as a consequence of the provisions~~ [fol. 1143] ~~of Article VIII of this Judgment except to such stockholders whose applications for a distribution of General Motors shares pursuant to the provisions of said Article are approved, and that each such stockholder will be regarded as having received a distribution of property as a dividend only at the effective date of such distribution and only to the extent that such distribution is approved;~~

Now, therefore, it is hereby Ordered, Adjudged and Decreed as follows:

I

For the purposes of this Judgment:

(a) "Du Pont" means defendant E. I. du Pont de Nemours and Company; "General Motors" means defendant General Motors Corporation; "Christiana" means defendant Christiana Securities Company; "Delaware" means defendant Delaware Realty and Investment Company.

(b) "General Motors stock" means shares of General Motors of any class having voting rights, including all such shares which reflect adjustments in the capital structure of General Motors by way of stock dividends, stock splits, recapitalization or otherwise, but does not include rights to acquire General Motors stock.

(c) "Du Pont Common" means shares of du Pont common stock of any class having voting rights, including all [fol. 1144] such shares which reflect adjustments in the

capital structure of du Pont by way of stock dividends, stock splits, recapitalization or otherwise, but does not include (i) rights to acquire du Pont Common, or (ii) Du Pont Special Common to be authorized as provided for in Article VIII of this Judgment.

(d) "Du Pont Special Common" means shares of the new class of du Pont common stock, however in fact denominated, to be authorized as provided for in Article VIII of this Judgment, including all such shares which reflect adjustments in the capital structure of du Pont by way of stock dividends, stock splits, recapitalization or otherwise, but does not include rights to acquire du Pont Special Common.

(e) "Holder of du Pont Common" and "holder of du Pont Special Common" mean any holder of record of du Pont Common and du Pont Special Common, respectively; "Christiana stockholder" means any holder of record of Christiana common stock; "Delaware stockholder" means any holder of record of Delaware capital stock.

(f) "Reserved General Motors shares" means the General Motors stock reserved by du Pont in accordance with the first sentence of Paragraph (a) of Article VIII of this Judgment and are not included in General Motors take-down shares.

(g) "General Motors take-down shares" means the General Motors stock made available for distribution to holders of Common in accordance with the second sentence of Paragraph (a) and Paragraph (d) of Article VIII of this Judgment.

[fol. 1145] (h) "Substituted assets" means the net proceeds or avails of any sale or exchange (after taxes with respect to such sale or exchange) of the General Motors take-down shares or of other substituted assets.

(i) "General Motors take-down income" means du Pont's income from General Motors take-down shares (and/or substituted assets) less all expenses, taxes and other charges properly allocable thereto.

"Undistributed General Motors take-down income" as of any time means the amount of General Motors take-down income received by du Pont up to such time from General Motors take-down shares (and/or substituted assets) less (A) the excess of the dividends or other dis-

tributions theretofore declared or paid on du Pont Common after the filing of the notification referred to in paragraph (a) of Article VIII of this Judgment over the dividends or other distributions theretofore declared or paid on du Pont Special Common during the same period, and (B) the amount of such income theretofore paid to any holders of du Pont Common pursuant to subparagraph (2) of paragraph (d) of Article VIII of this Judgment.

(j) "Pass-through voting rights on General Motors shares" shall mean voting rights on General Motors shares exercisable by stockholders of du Pont, Christiana and Delaware under the provisions of Article IV of this Judgment.

[fol. 1146] II

The Judgment of December 9, 1954 of this Court dismissing the amended complaint is hereby vacated insofar as it adjudges du Pont not to have violated Section 7 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes" commonly known as the Clayton Act. In conformity with the mandate of the Supreme Court of the United States it is hereby adjudicated that, at the time of suit, there was a reasonable probability that the acquisition by du Pont of General Motors stock was likely to create in du Pont a monopoly in the line of commerce consisting of automotive fabrics and finishes in violation of Section 7 of the Clayton Act.

III

(a) Du Pont, Christiana and Delaware are each hereby enjoined and restrained from exercising voting rights, or soliciting any other person in any manner with respect to exercising voting rights, directly or indirectly, on General Motors stock, by whomsoever owned of record or beneficially, and including pass-through voting rights on General Motors stock; provided, however, that nothing in this paragraph shall prevent du Pont, Christiana or Delaware from performing acts required to be performed by them in connection with the passing through of voting rights to their stockholders pursuant to Article IV.

[fol. 1147] (b) No person who—

(i) is a director or officer of du Pont, Christiana or Delaware, or is a spouse or relative living in the same house with any such person, or

(ii) is employed by du Pont and is regularly and directly engaged in selling automotive finishes or fabrics to General Motors,

shall exercise pass-through voting rights on General Motors stock, shall exercise any authority or power to direct any other person with respect to exercising such voting rights, or shall solicit any other person in any manner with respect to exercising such voting rights, directly or indirectly. Nothing herein contained shall prevent any party or person from applying to the Court for permission for any or all of the persons specified in (i) or (ii) above to exercise such voting rights in respect of particular corporate matters (such as charter amendments and authorization of securities) not involving elections, compensation of personnel or transactions between General Motors and du Pont.

IV

All voting rights on General Motors stock which, except for Paragraph (a) of Article III, would be exercisable by du Pont, Christiana or Delaware shall be passed through to their respective stockholders in accordance with the following Paragraphs (a) to (d) inclusive of this Article. In the case of Christiana and Delaware, this requirement [fol. 1148] shall apply to all voting rights on shares of General Motors stock directly held by either of them and also to voting rights passed through to either of them as stockholders of du Pont and/or Christiana under the provisions hereof. In each case the stockholders entitled to exercise the voting rights hereunder shall be the stockholders of record of the respective corporations as of the record date for determination of General Motors stockholders entitled to notice of and to vote at each annual or special meeting of stockholders of General Motors, subject, however, to the restrictions contained in Article III of this Judgment.

(a) The number of shares of General Motors stock held by du Pont, Christiana and Delaware (if any) to be voted

by each du Pont, Christiana and Delaware stockholder shall be determined, as of the record date for the determination of General Motors stockholders entitled to notice of and to vote at a General Motors annual or special meeting, as follows:

(1) The number of General Motors take-down shares at such date shall be divided by the number of shares of du Pont Common outstanding and entitled to vote at such date, and each holder of du Pont Common shall be entitled to vote (subject, however, to the provisions of Article III of this Judgment) the number of General [fol. 1149] Motors shares determined by multiplying the quotient by the number of shares of du Pont Common owned of record by such stockholder at such date.

(2) The number of reserved General Motors shares at such date shall be divided by the total number of shares of du Pont Common and du Pont Special Common outstanding and entitled to vote at such date, and each holder of du Pont Common and/or du Pont Special Common shall be entitled to vote (subject, however, to the provisions of Article III of this Judgment) the number of General Motors shares determined by multiplying the quotient by the total number of shares of du Pont Common and du Pont Special Common owned of record by such holder at such date.

(3) The number of shares of General Motors stock which each Christiana stockholder shall be entitled to vote (subject, however, to the provisions of Article III of this Judgment) shall be determined by dividing the number of such shares (if any) held of record by Christiana plus the number of such shares which Christiana, but for Paragraph (a) of Article III, would be entitled to vote as a du Pont stockholder at such date, by the number of shares representing all Christiana [fol. 1150] common stock outstanding and entitled to vote at such date, and multiplying the quotient by the number of shares representing Christiana common stock owned of record by such Christiana stockholder at such date.

(4) The number of shares of General Motors stock which each Delaware stockholder shall be entitled to

vote (subject, however, to the provisions of Article III of this Judgment) shall be determined by dividing the number of such shares (if any) held of record by Delaware plus the number of such shares which Delaware, but for Paragraph (a) of Article III, would be entitled to vote as a Christiana stockholder and as a du Pont stockholder at such date, by the number of shares representing all capital stock of Delaware outstanding and entitled to vote at such date, and multiplying the quotient by the number of shares representing capital stock of Delaware owned of record by such Delaware stockholder at such date.

(b) The following steps shall be taken prior to each annual or special meeting of General Motors stockholders:

(1) Promptly after the record date for the determination of General Motors stockholders entitled to notice of and to vote at the said meeting, du Pont, Christiana and Delaware shall deliver to General [fol. 1151] Motors a properly certified statement setting forth (i) a list of their respective stockholders as of that record date who are entitled to vote the General Motors stock held of record by du Pont, Christiana and/or Delaware, showing the name of each such stockholder, his address, and the number of shares of each class of their respective voting stocks which he holds, and (ii) the quotients determined in accordance with Paragraph (a) above.

(2) Du Pont, Christiana and Delaware shall each execute such instruments and take such other steps as may be necessary to authorize each such stockholder to vote at the said meeting of the stockholders of General Motors, in the manner hereinafter provided in Paragraph (b)(3) of this Article IV, the number of shares of General Motors stock determined for each such stockholder in accordance with Paragraph (a) above, and du Pont, Christiana and Delaware shall each furnish to General Motors evidence of such authorization in form satisfactory to General Motors.

(3) Du Pont, Christiana and Delaware shall each arrange to furnish to each of its stockholders so en-

titled to vote a copy of the Notice of Meeting, Proxy [fol. 1152] Statement, proxy or proxies and other proxy soliciting material prepared by General Motors (or by any other person or group of persons making a solicitation under applicable regulations of the Securities and Exchange Commission) for distribution to stockholders of General Motors in connection with said meeting, except that each proxy shall be modified or supplemented in such manner as to empower each such stockholder freely and effectively to vote such number of General Motors shares as are determined for each such stockholder in accordance with Paragraph (a) above; shall arrange to inform each such stockholder of the number of shares of General Motors stock which the holder of each share of du Pont, Christiana and Delaware stock is entitled to vote as such proxy holder; and shall see that each such stockholder is notified of his right, in accordance with this Article IV, to vote as such proxy holder.

(4) Du Pont, Christiana and Delaware shall each also arrange to furnish each such stockholder, at or prior to the time it furnishes the proxy soliciting material for each annual meeting of the stockholders of General Motors, a copy of the latest Annual Report of General Motors.

[fol. 1153] (c) The expenses incurred by General Motors in carrying out the provisions of this Judgment shall, when approved by this Court, be paid by du Pont, which may charge a proper proportion thereof to General Motors income; provided, however, that Christiana and Delaware, respectively, shall pay the expenses incurred in connection with the transmissions and notifications to Christiana and Delaware stockholders.

(d) The provisions of this Article IV shall not apply with respect to any annual or special meeting of General Motors held within ———— days from the effective date of this Judgment.

V

Unless and until du Pont, Christiana and Delaware shall have disposed of the legal and beneficial interest in all General Motors stock—

(a) General Motors is hereby enjoined and restrained from having as a director, officer or employee any person who is a director, officer or employee of du Pont, Christiana or Delaware;

(b) Du Pont, Christiana and Delaware are each hereby enjoined and restrained from having as a director, officer or employee any person who is a director, officer or employee of General Motors; and

[fol. 1154] (c) Du Pont, Christiana and Delaware are each hereby enjoined and restrained from nominating any person as a director, officer or employee of General Motors.

VI

(a) Du Pont, Christiana and Delaware are each hereby enjoined and restrained from—

(1) exercising or attempting to exercise any control over General Motors or using or attempting to use its stock ownership in General Motors to influence General Motors in any manner, or

(2) acquiring, directly or indirectly, any additional shares of General Motors stock except—

(i) shares that may be distributed by General Motors with respect to outstanding shares already held,

(ii) shares that may be distributed pro rata by du Pont or Christiana to their respective stockholders,

(iii) shares that may be distributed by du Pont or Christiana in redemption of or in exchange for outstanding shares of their own capital stock, or

(iv) shares that may be acquired by Christiana or Delaware, with approval of the Court, pursuant to the provisions of Article VIII of this Judgment.

[fol.1155] (b) If du Pont, Christiana or Delaware shall receive rights to purchase General Motors stock, either directly or (in the case of Christiana or Delaware) by virtue of this Article VI, they are each hereby enjoined and restrained from exercising any such rights, but each of them may in its discretion distribute in whole or in part or sell in whole or in part such rights received by it. In the case of rights applicable to reserved General Motors

shares, any such distribution by du Pont shall be made pro rata to holders of du Pont Common and holders of du Pont Special Common, and the net proceeds of any such sale by du Pont shall be credited to income other than General Motors take-down income. In the case of rights applicable to General Motors take-down shares, any such distribution by du Pont shall be made pro rata to holders of du Pont Common only, and the net proceeds of any such sale by du Pont shall be credited to General Motors take-down income.

VII

(a) Not more than ———— months from the effective date of this Judgment, du Pont and General Motors shall terminate and cancel any agreement, arrangement or understanding presently in effect between them providing for the purchase by General Motors of any specified per- [fol. 1156] centage of its requirements of automotive finishes or fabrics for a period in excess of one year, or for such longer period as may be necessary to assure General Motors of a supply for models of any specified year; and they are each hereby enjoined and restrained from entering into any such agreement, arrangement or understanding in the future, except with the approval of the Court.

(b) Du Pont is hereby enjoined from seeking preferential treatment in the sale of any product by reason of du Pont ownership of General Motors stock; however, nothing herein shall be deemed otherwise to limit the right of du Pont to endeavor to sell or to sell its products to General Motors.

VIII

Not later than ———— after the effective date of this Judgment, du Pont shall complete all necessary steps and arrangements, in accordance with the following paragraphs (a) to (h) inclusive, whereby each du Pont stockholder may apply for and obtain, subject to the conditions hereinafter set forth, part or all of his pro rata share of the General Motors take-down shares owned by du Pont; and du Pont shall notify this Court, all parties hereto, and each of its stockholders of the date when this Article shall become operative.

(a) Du Pont shall be authorized to designate to be re-

served by it, and not made available as take-down shares, [fol. 1157] not in excess of ———— shares of General Motors stock and shall be entitled to retain, or, with approval of the Court, to sell or otherwise dispose of any or all of such shares, but shall not be entitled to exercise the voting rights of any of such shares. The balance of the General Motors stock now held by du Pont shall, until disposed of by du Pont, be available for take-downs by du Pont stockholders in accordance with the following paragraphs of this Article. The General Motors take-down shares and substituted assets shall at all times (until distributed, sold or otherwise disposed of) remain assets of du Pont free from any lien, claim, right or charge (whether legal o requitable) of any Common stockholder of du Pont and shall not be deemed to be subject to any trust nor shall there be created any legal or equitable interest therein in anyone whomsoever or whatsoever (save and except du Pont) by reason of this Judgment or the amendments of the certificate of incorporation of du Pont pursuant thereto, and, without limiting the generality of the foregoing clause, the General Motors take-down shares and substituted assets shall, so long as they shall be held by du Pont, and subject to the express restrictions of this Judgment, be available to the same extent as any other general asset of du Pont to satisfy the claims, demands or causes of action of any and all present and future creditors or preferred share-[fol. 1158] holders of du Pont, and in case any creditor or preferred shareholder of du Pont shall at any time be entitled to enforce his right against the general assets of du Pont he may enforce the same against the General Motors take-down shares and substituted assets with the same freedom as against any other asset at the time owned by du Pont and remaining unpledged or unmortgaged. As soon as practicable and not later than ———— after the effective date of this Judgment, du Pont shall file with this Court and serve upon all other parties hereto a notification of the number of shares of General Motors stock which it elects to reserve pursuant to the first sentence of this Paragraph (a), and the number of shares which will be available for take-downs by stockholders pursuant to the second sentence of this Paragraph (a).

(b) Du Pont shall establish and maintain such accounting procedures as will readily permit the accurate deter-

mination of the amount, at any time, of the General Motors take-down shares and/or substituted assets, and of the undistributed General Motors take-down income then available for distribution.

(c) Du Pont shall take, subject to the applicable laws of the State of Delaware, all necessary and appropriate steps to authorize the creation of a new class of common stock [fol. 1159] ("du Pont Special Common") which shall have the same rights and limitations as the present du Pont Common except as follows:

(1) No dividend or any other distribution, whether in voluntary or involuntary liquidation or otherwise, may be paid or declared with respect to the shares of du Pont Special Common unless a dividend or distribution of at least an equal amount is simultaneously paid or declared with respect to the shares of du Pont Common; but any dividend or distribution paid or declared with respect to the shares of du Pont Common may exceed that paid or declared with respect to the shares of du Pont Special Common by an amount which in the aggregate is not in excess of the amount of the undistributed General Motors take-down income, if any, then on hand.

(2) No amendment increasing the relative rights of the du Pont Common or decreasing the relative rights of the du Pont Special Common shall be made except on affirmative vote of holders of at least two-thirds of the du Pont Special Common outstanding voting as a class; and no amendment increasing the relative rights of the du Pont Special Common or decreasing the relative rights of the du Pont Common shall be made except on affirmative vote of holders of at least two-thirds of the du Pont Common outstanding voting as a class.

(3) So long as du Pont holds any General Motors take-down shares (and/or substituted assets), du Pont shall not issue any additional shares of du Pont Common, except as a stock split or as a stock dividend in respect of outstanding du Pont Common, but it may issue such additional shares of du Pont Special Common, in such manner and for such consideration, as it may determine in its discretion from time to time.

(4) The certificaate of incorporation of du Pont as the same shall be amended shall contain such provisions with respect to recapitalizations, stock splits, [fol. 1160] stock dividends, mergers, consolidations and reorganizations, as the same may affect the du Pont Common and the du Pont Special Common and the rights of the holders thereof, as shall be approved by the Court as fair and equitable as between the holders of the du Pont Common and the du Pont Special Common and consistent with the provisions of this Article VIII.

(d) Any holder of du Pont Common may apply to du Pont for any part or all of his pro rata share of the General Motors take-down shares (and/or substituted assets), and, if such application is approved and accepted as hereinafter provided, such stockholder shall receive upon surrender and cancellation of his shares of du Pont Common, ~~and upon presentation of ——— copies of an agreement, on Treasury Department Form 906, in the form set forth in Exhibit ——hereto, duly executed by him:~~ — — — — — —

(1) One share of du Pont Special Common for each share of du Pont Common surrendered and cancelled; and

(2) The amount of General Motors take-down shares (and/or substituted assets) and an amount equal to the undistributed General Motors take-down income, if any, which is attributable to the share or shares of du Pont Common surrendered and cancelled, provided that, at the option of du Pont, cash or scrip may be paid in lieu of any fraction of a General Motors share (or other securities included among the substituted assets).

(e) Not more than thirty days after the end of each calendar quarter of each year du Pont shall file with this [fol. 1161] Court a statement in writing showing all pending applications by holders of du Pont Common that have been submitted in accordance with the provisions of this Article VIII of this Judgment, disclosing in the case of each such application the number of shares of du Pont Common tendered, the name of the stockholder making the application, and, if any person specified in Paragraph (b) of Article

III is the beneficial owner of such shares or has the power to exercise or to direct the exercise of pass-through voting rights with respect thereto, the name and relationship to the defendant of such person. The said statement shall be available for inspection by all parties hereto but shall not be disclosed to any other person except pursuant to an order of this Court. Within thirty days after the filing of the said statement, any party hereto may provide this Court with information and recommendations as to the probable economic consequences of the approval of any or all such applications, as to whether acceptance of any or all such applications would be consistent with the purposes and provisions of this Judgment, as to the necessity or appropriateness of imposing conditions on acceptance of any or all such applications, and any other relevant matter. This Court may request or direct any party hereto to submit such additional information as this Court believes relevant.

[fol. 1162] (f) Upon receipt of the statement and data prescribed in Paragraph (e) above, and after a hearing, if a hearing is deemed necessary, this Court will make findings as to:

(1) the probable economic or market consequences of the approval of each application,

(2) whether approval of each application would be consistent with the purposes and provisions of this Judgment,

(3) what conditions, if any, should be imposed with respect to exercise of voting rights or otherwise, and

(4) such other factors as may appear relevant at the time each application is considered,

and will direct du Pont to reject or accept applications to the extent, in the amount, in the order, and subject to the conditions, if any, determined by this Court. Du Pont shall notify each applying holder of du Pont Common whether and to what extent this Court has determined that his application should be accepted and shall effect the appropriate distribution to such holder pursuant to the aforesaid directions of this Court.

(g) As soon as practicable, du Pont shall apply for listing of the du Pont Special Common on a national securities exchange.

[fol. 1163] (h) Du Pont shall take all necessary and appropriate action to advise holders of du Pont Common of the provisions of this Article VIII, to prescribe the form of and manner in which applications may be made by such stockholders, to establish subject to the approval of this Court the rights of such stockholders pending consideration of their applications, and to effectuate such distributions as are approved by this Court under the terms of this Article VIII.

IX

Du Pont shall be authorized at any time, or from time to time, to sell or otherwise dispose of all or any part of the General Motors stock held by it; provided, however, that each sale or other disposition must first be approved by this Court after reasonable notice to the Attorney General.

X

(a) Within ———— days of the effective date of this Judgment, each defendant shall furnish a copy of this Judgment to each of its directors and officers and to each of its executives responsible for the execution of any of the provisions hereof; and thereafter, upon the first election or appointment of any director or officer or any such executive [fol. 1164] of any defendant, such defendant shall furnish a copy of this Judgment to him.

(b) Until further order of the Court, every proxy statement or other proxy soliciting material prepared by General Motors in connection with a meeting of its stockholders shall contain an appropriate summary of the provisions of Articles III and IV of this Judgment.

XI

(a) Du Pont, Christiana and Delaware shall each report in writing annually to this Court the actions taken in compliance with the provisions of this Judgment and shall serve copies of such reports upon all parties hereto.

(b) At any time, or from time to time, the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, may make written application to the Court for an order, after due notice and hearing thereon, requiring any defendant to submit in writing such special

report or reports with respect to the matters contained in this Judgment as may then be reasonably necessary to the enforcement of this Judgment.

(c) Any of the parties, or either of the amici curiae appointed to represent the interests of du Pont and General [fol. 1165] Motors stockholders, shall have the right to file with the Court relevant information and recommendations as to any development that would have the effect of eliminating or substantially reducing the tax payable under the present provisions of the Internal Revenue Code by du Pont stockholders upon a distribution to them of General Motors stock. Copies of such report shall be served on all other parties hereto, who shall then be afforded an opportunity to be heard on such report and any recommendations that may be contained therein.

XII

For the purpose of securing compliance with this Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall be permitted, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice as to time and subject matter to any defendant at its principal office, (1) to inspect during office hours all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant relating to any provisions of this Judgment, during which time counsel for such defendant may be present; and (2) subject to the reasonable convenience of such defendant and without re- [fol. 1166] straint or interference from it, to interview regarding any such provisions any officer or employee of such defendant, who, together with such defendant, may have counsel present. No information obtained by means provided in this Article or Paragraph (b) of Article XI of this Judgment shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Judgment or as otherwise required by law.

XIII

Jurisdiction is retained by this Court for the purpose of enabling any of the parties hereto to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of this Judgment or of any provision thereof, for the enforcement of compliance therewith and the punishment of any violation thereof, for the supervision of Articles VIII and IX of this Judgment, and for the granting of such further relief as may appear to be necessary or appropriate.

[fol. 1167] XIV

The effective date of this Judgment shall be 12.01 A.M. ——, —, ——.

——, ——, Judge of the United States District Court.

[fol. 1168] September 25, 1958.

Hon. Russell C. Harrington, Commissioner of Internal Revenue, Washington 25, D. C.

Dear Sir:

The undersigned respectfully submit their request for a ruling, as follows:

I. Statement of Facts

A. Background

This request is submitted pursuant to an order dated August 8, 1958 (a copy of which is attached as Exhibit 1 hereto) of the Honorable Julius H. Miner, Judge of the United States District Court, Northern District of Illinois, Eastern Division ("District Court"), in the case entitled "*United States of America,* Plaintiff v. *E. I. du Pont de Nemours and Company, et al.,* Defendants," Civil Action No. 49 C 1071. The ruling is requested with respect to certain transactions which would be effected under the terms of a final judgment which Andrew J. Dallstream ("amicus Dallstream"), amicus curiae appointed by the

District Court in said case, has proposed for adoption by the District Court, under circumstances set forth more fully below.

The above-mentioned case is a civil action brought by the Department of Justice under the Sherman Act and the [fol. 1169] Clayton Act. After a trial on the merits in the District Court, and upon direct appeal to the United States Supreme Court, the Supreme Court rendered its opinion on June 3, 1957 (*United States of America* v. *E. I. du Pont de Nemours and Company, et al.*, 353 U. S. 586) and remanded the case to the District Court for determination of the equitable relief necessary and appropriate in the circumstances.

On September 25, 1957, upon the remand to the District Court for determination of the appropriate relief, a pretrial conferenee was held before Judge Walter L. LaBuy. At its conclusion, Judge LaBuy entered an order (a copy of which is attached as Exhibit 2 hereto) which directed the parties and the amici curiae to file their proposed plans of compliance.

Pursuant to said order, the Department of Justice, on behalf of the United States of America as plaintiff, has submitted its proposed final judgment, which has previously been submitted to the Commissioner of Internal Revenue and a ruling letter issued thereon, under date of May 9, 1958, bearing symbols T:R:R-ES, and addressed to Mr. Daniel M. Gribbon, c/o Covington & Burling, Union Trust Building, Washington 5, D. C.

Pursuant to the said order of the District Court, as amended, amicus Dallstream filed with the District Court, on August 7, 1958, his recommended form of proposed judgment (hereinafter called the "Proposed Judgment") in said case. A copy of the Proposed Judgment is attached [fol. 1170] and market Exhibit 3 hereto.

B. Names and Addresses of Interested Parties

This request for ruling is submitted by the following parties:

E. I. du Pont de Nemours and Company ("du Pont"), Wilmington 98, Delaware, a defendant in the above-mentioned case;

Christiana Securities Company ("Christiana"), Wilmington, Delaware, a defendant in the above-mentioned case;

Delaware Realty & Investment Company ("Delaware"), Wilmington, Delaware, a defendant in the above-mentioned case;

Manuel E. Cowen, One North La Salle Street, Chicago, Illinois, as amicus curiae representing the interests of stockholders of General Motors Corporation; and

Andrew J. Dallstream, 231 South La Salle Street, Chicago, Illinois, as amicus curiae representing the interests of stockholders of E. I. du Pont de Nemours and Company, and as the proponent of the Proposed Judgment which is the occasion and subject matter of the requested ruling.

All parties to the proceeding in the District Court cooperated in the preparation hereof pursuant to the order of the District Court dated August 8, 1958 (Exhibit 1).

[fol. 1171] C. Relevant Data

There were previously submitted, in connection with the earlier request for ruling, copies of the financial statements of du Pont, General Motors, Christiana and Delaware, as of June 30, 1957. There are submitted herewith the annual statements of these four corporations for the calendar year 1957, marked Exhibits 4, 5, 6 and 7, respectively.

As of December 31, 1957, General Motors had outstanding 280,989,096 shares of common stock, all entitled to vote. It also has outstanding two issues of preferred stock, neither entitled to vote except in cases of certain defaults.

As of December 31, 1957, du Pont had outstanding 45,604,345 shares of common stock. Du Pont also has outstanding two issues of preferred stock, neither entitled to vote except in cases of certain defaults.

Du Pont owns 63,000,000 shares of General Motors common stock, or approximately 22.4 percent of the outstanding shares of General Motors common stock. The General Motors shares owned by du Pont have an aggregate adjusted income tax basis in the hands of du Pont of approxi-

mately $132,000,000, consisting of one block of 3,000,000 shares having a total basis of approximately $76,000,000 and various other blocks of shares aggregating 60,000,000 shares [fol. 1172] having a total basis of approximately $56,000,000. Du Pont can identify the separate blocks and establish the respective bases. Using recent quotations on the New York Stock Exchange (the closing price for General Motors on August 11, 1958, was 44-⅝), the aggregate market quotation for du Pont's holding of General Motors shares would be approximately $2,800,000,000, which is substantially in excess of du Pont's accumulated earnings and profits. As a rough approximation for the purposes of this request, the accumulated and current earnings and profit of du Pont may be taken as $1,100,000,000.

Christiana presently owns 535,500 shares of General Motors common stock, which have an aggregate adjusted income tax basis of approximately $4,825,000. Delaware presently does not own any shares of General Motors stock.

D. Amicus Dallstream's Proposed Judgment

Amicus Dallstream's Proposed Judgment contains four major provisions. These are (1) the "pass through" of voting rights of the General Motors shares now held by du Pont and Christiana, and the prohibition against certain individuals having specified connections with the managements of du Pont, Christiana or Delaware from exercising, or directing or soliciting others with respect to the exercise of, such "pass through" voting rights; (2) prohibitions [fol. 1173] as to interlocking between du Pont, Christiana and Delaware, on the one hand, and General Motors, on the other hand; (3) prohibitions as to the exercise of control or influence by du Pont, Christiana or Delaware over General Motors; and (4) the provisions for "take-down" of General Motors shares under supervision of the District Court. These will be summarized in order.

1. The "Pass Through" of Voting Rights

Under Articles III and IV of the Proposed Judgment, du Pont, Christiana and Delaware are enjoined from voting any General Motors shares and are required to "pass through" to their respective stockholders the right to vote any General Motors shares held by them. In addition,

Christiana and Delaware are required to "pass through" to their respective stockholders the voting rights which Christiana and Delaware receive as stockholders of du Pont and, in the case of Delaware, as a stockholder of Christiana. However, certain persons connected with the managements of the three corporations are specifically enjoined from exercising, or directing or soliciting others with respect to the exercise of, "pass through" voting rights on General Motors shares. Du Pont, Christiana and [fol. 1174] Delaware are to take such steps as may be necessary to assure that each stockholder will be empowered freely and effectively to exercise his "pass through" voting rights.

2. Prohibitions as to Interlocking

Under Article V of the Proposed Judgment, du Pont, Christiana and Delaware are enjoined, so long as they hold any stock of General Motors, from having as a director, officer or employee any person who is a director, officer or employee of General Motors and from nominating any person as a director, officer or employee of General Motors.

3. Provisions as to Control

Du Pont, Christiana and Delaware are enjoined from exercising or attempting to exercise any control over General Motors or using or attempting to use their stock ownership in General Motors to influence General Motors in any manner (Article VI of the Proposed Judgment). In addition, du Pont is enjoined from seeking preferential treatment in the sale of any product by reason of its ownership of General Motors stock (Article VII).

[fol. 1175] 4. Provisions for "Take-Down" of General Motors Shares

The essential features of the "take-down" provisions of the Proposed Judgment, which are set forth in Article VIII, are as follows:

(a) Du Pont would establish and maintain on its books a complete segregation between (i) "General Motors shares allocated for take-downs" and any and all substitutions therefor, and items of income and expense applicable there-

to, and (ii) all of du Pont's other assets and items of income and expense applicable thereto.

(b) Du Pont would have the right to designate some portion of its present holding of 63,000,000 shares of General Motors common stock, not to exceed an amount to be fixed by the District Court at the time of the entry of the Judgment (amicus Dallstream has recommended a maximum in the range of 9,000,000 to 13,000,000 shares), that would not be "allocated for take-downs" but would be "reserved for general corporate purposes".

(c) Du Pont would amend its certificate of incorporation so as to create a new class of common stock ("Special Common") in addition to its present preferred stocks and present Common Stock ("Common"). The Special Common would be identical with the Common except that it would represent no interest in General Motors shares allocated for take-downs and except for differences in special [fol. 1176] voting rights as discussed in paragraphs (g), (h) and (i) below. Du Pont's certificate of incorporation would provide that in connection with each future dividend on Common there be specified (i) the amount per share paid out of income from General Motors shares (and/or any substituted assets) allocated for take-downs ("General Motors income"), and (ii) the amount per share paid out of other sources, and that in each instance the latter amount must be equal to the amount of the dividend concurrently paid on the Special Common. The certificate of incorporation would also contain a corresponding provision with respect to liquidation or other distributions out of capital.

(d) Any holder of du Pont Common stock may apply to du Pont for all or any part of his pro rata portion of the General Motors stock (and/or any substituted assets) allocated for take-downs. Du Pont is required to file with the District Court, quarter-annually, a statement in writing showing all such pending applications, the number of shares of du Pont Common tendered, the name of each stockholder making application, and, if any person restricted from exercising "pass through" voting rights is the beneficial owner of the tendered shares or has the power to exercise or direct the exercise of "pass through" voting with respect thereto, the name and relationship of such person to the defendants. Within thirty days thereafter, any party

[fol. 1177] to the suit may provide the District Court with information and recommendations as to the probable economic consequence of the approval of any or all applications as to whether the acceptance of any or all applications would be consistent with the purposes and provisions of the Judgment, as to the necessity and appropriateness of imposing conditions on acceptance of any or all such applications, and any other relevant matter. The District Court may request or direct any party to submit such additional information as the District Court believes relevant.

(e) Upon receipt of the above-mentioned statement and data, and after a hearing (if any), the District Court will make findings as to:

(i) the probable economic consequences of the approval of each application,

(ii) whether approval of each application would be consistent with the purposes and provisions of the Judgment,

(iii) what conditions, if any, should be imposed with respect to exercise of voting rights or otherwise, and

[fol. 1178] (iv) such other factors as may appear relevant at the time each application is considered:

In this connection, the District Court might consider, among other things, such matters as the probable impact of the approval of applications for take-down on market values, the identity of the applicant and his relationship to the defendants, whether it would be consistent with the purposes of the decree to permit a particular applicant to receive the General Motors shares without restrictions, whether conditions should be imposed with respect to the voting or disposition of the General Motors shares subject to take-down, and other similar matters.

(f) On the basis of these findings, the District Court will determine whether any applications can be accepted and, if so, for how many shares and from which applicants and the conditions, if any, which should be imposed on the approval of any application. Thereupon, there will be distributed to each stockholder whose application has been approved his pro rata portion of the General Motors shares. (and/or substituted assets) allocated for take-downs and

undistributed General Motors income, provided that, at the option of du Pont, cash or scrip may be paid in lieu of any fraction of a General Motors share (or of any other security included among the substituted assets). Further, the stock-[fol. 1179] holder will be required to surrender his shares of du Pont Common and will receive one share of du Pont Special Common for each share of Common surrendered.

(g) The General Motors shares allocated for take-downs would be treated in all respects as special assets for the sole and exclusive benefit of holders of Common (subject to legal rights and prior claims of creditors and holders of preferred stocks), in accordance with the foregoing paragraphs. Hence, disposition, other than by way of distributions to holders of du Pont Common, of more than 5% of the then amount of General Motors shares allocated for take-downs would be permitted only upon the approving vote of holders of two-thirds of the shares of Common then outstanding and with the approval of the District Court. The proceeds or avails of any such disposition would become substituted assets allocable for take-downs. While held by du Pont, voting rights on all General Motors shares allocated for take-downs would be "passed through" to holders of the Common only.

(h) The General Motors shares reserved for general corporate purposes could be retained by du Pont indefinitely or freely disposed of in any manner, subject to approval of the District Court. While held by du Pont, the voting rights [fol. 1180] on all shares reserved for general corporate purposes would be "passed through" to holders of Special Common as well as Common ratably.

(i) Any amendment increasing the relative rights of the Common or decreasing the relative rights of the Special Common would require an affirmative two-thirds vote of outstanding Special Common; and any amendment increasing the relative rights of the Special Common or decreasing the relative rights of the Common would require an affirmative two-thirds vote of the outstanding Common. In all other respects, the voting rights of Special Common and Common would be without distinction as to class.

The Proposed Judgment (paragraph (h) of Article VIII) provides that du Pont shall (i) prescribe the form and manner in which applications for take-downs may be made by the holders of du Pont Common, (ii) establish, subject to

the approval of the District Court, the rights of such stockholders pending consideration of their applications, and (iii) effectuate such distributions as the District Court may approve. The details for handling these problems have not yet been worked out. However, it is anticipated that the detailed provisions to be worked out will require that at some point, at or prior to the approval of the application by the District Court, each application would become ir- [fol. 1181] revocable (and binding on heirs, legal representatives and assigns of the applicant) unless the District Court purposes to impose conditions on the approval of the application, in which event the application may be withdrawn.

5. Other Provisions of the Proposed Judgment

Under Article VI of the Proposed Judgment, du Pont, Christiana and Delaware will be enjoined from acquiring any additional shares of General Motors stock except (i) shares that may be distributed by General Motors with respect to outstanding shares already held, (ii) shares that may be distributed pro rata by du Pont or Christiana to respective stockholders, (iii) shares that may be distributed by du Pont or Christiana in redemption of or in exchange for outstanding shares of their own capital stock, or (iv) shares that may be acquired by Christiana or Delaware, with approval of the Court, pursuant to the "take-down" provisions of the Proposed Judgment. In the event du Pont, Christiana or Delaware receive rights to purchase General Motors stock, they each will be enjoined from exercising any such rights, but each of them may either distribute in whole or in part or sell in whole or in part such rights. In the case of rights applicable to General Motors stock reserved for general corporate purposes, any such distribution by du Pont will be made pro rata to holders of [fol. 1182] du Pont Common and holders of du Pont Special Common, and the proceeds of any such sale by du Pont will be credited to other than General Motors income. In the case of rights applicable to General Motors stock allocated for take-downs, any such distribution by du Pont will be made pro rata to holders of du Pont Common only, and the proceeds of any such sale by du Pont will be credited to General Motors income.

Under Article VII of the Proposed Judgment, du Pont and General Motors are required to terminate any agreement presently in effect between them providing for the purchase by General Motors of any specified percentage of its requirements of automotive finishes or fabrics for a period in excess of one year or such longer period as may be necessary to assure General Motors of a supply for models of any specified year; and du Pont and General Motors will be enjoined from entering into any such agreement in the future, except with the approval of the District Court.

Under Article IX of the Proposed Judgment, du Pont will be authorized at any time, or from time to time, to sell or otherwise dispose of all or any part of General Motors stock held by it, subject, in each instance, to obtaining the approval of the District Court, and subject also, in the case of General Motors shares allocated for take-downs, to authorization by a vote of stockholders as and to the extent provided in paragraph (c)(2) of Article VIII of the Proposed Judgment.

[fol. 1183] II. Questions With Respect to Which Rulings Are Requested

It is respectfully requested that the Commissioner rule on the following questions relating to the Federal tax consequences of the Proposed Judgment.

A. Tax Consequences of Transactions and Events Prior To Take-Down

1. Will income or loss be realized by du Pont or any stockholder of du Pont, or by Christiana or Delaware or any stockholder of Christiana or Delaware, upon or by reason of—

(a) the entry of the Proposed Judgment;

(b) the designation by du Pont, pursuant to paragraphs (a) and (b) of Article VIII of the Proposed Judgment, of the number of General Motors shares reserved for general corporate purposes or the establishment upon du Pont's books of separate and independent accounts for the General Motors shares allocated for take-downs; or

(c) the amendment of the du Pont certificate of incorporation creating du Pont Special Common, as [fol. 1184] provided in paragraph (c) of Article VIII of the Proposed Judgment?

2. Will income or loss be realized by any holder of du Pont Common by virtue of the creation, grant or exercise of the right set forth in paragraph (d) of Article VIII of the Proposed Judgment to apply for any part or all of his pro rata share of the General Motors stock (and/or substituted assets) allocated for take-downs and of General Motors income prior to the time that such holder's application for take-down is approved by the District Court?

B. Tax Consequences of Take-Down

3. Will the delivery to a holder of du Pont Common, pursuant to an approved application for take-down, of full shares of General Motors stock (and/or substituted assets), of cash or scrip in lieu of a fractional share and of General Motors income constitute a distribution under Section 301 of the Internal Revenue Code of 1954 and Section 1.301-1(1) of the Regulations thereunder?

4. If the answer to Question 3 above is in the negative, how will such delivery be treated?

[fol. 1185] 5. Will any income or loss be realized by a holder of du Pont Common upon or by reason of the receipt, pursuant to an approved application for take-down, of du Pont Special Common?

C. Subsidiary Tax Consequences

6. If the answer to Question 2 is in the negative—

(a) Will income be realized by a holder of du Pont Common in respect of a distribution pursuant to an approved application for take-down on the date that said approval becomes final or on the date that the distribution pursuant thereto first becomes available to such holder?

(b) If a holder of du Pont Common dies before such distribution first becomes available, will the date on which approval of his application becomes final or the date on which the distribution pursuant thereto

first becomes available be controlling for purposes of determining (i) the gross income returnable in the decedent's final return, (ii) the decedent's gross estate for Federal estate tax purposes and (iii) the application of Section 691 of the Internal Revenue Code?

[fol. 1186] 7. Will du Pont be required to include in its gross income a distribution received by it in respect of General Motors shares allocated for take-downs, as to which an application or applications for take-down have been made, where the record date for such distribution occurs (a) prior to the date (determined by the answer to Question 6(a) above) on which income is realized in respect of such take-down by the holder of du Pont Common making any such application, or (b) on or after such date? To the extent du Pont is required to include in its gross income a distribution received by it in respect of General Motors shares allocated for take-downs, will it be entitled to the deduction provided in Section 243 of the Internal Revenue Code with respect thereto?

8. Will distributions by du Pont to holders of du Pont Common from General Motors income, other than in connection with approved applications for take-down, constitute distributions by du Pont under Section 301 of the Internal Revenue Code and will they be taxable at the time of each such distribution as therein provided?

9. If du Pont, Christiana or Delaware receive any rights to acquire General Motors stock, will a distribution of such rights to their respective stockholders constitute distributions of property under Section 301, subject to the provisions of Sections 307 and 1223(5), and, if so, will the [fol. 1187] answers to the questions set forth under Question 10 below with respect to distributions of General Motors shares be applicable thereto? If du Pont, Christiana or Delaware sells such rights, will gain or loss be realized by the seller and be taxable in accordance with the provisions of Sections 307, 1201(a), 1211(a) and 1223(5)?

10. If the answer to Question 3 is in the affirmative—

(a) With respect to the distribution of full shares of General Motors stock (and/or substituted assets) and of scrip in lieu of a fractional share to a holder

of du Pont Common pursuant to an approved application for take-down, will the rulings contained in paragraphs (4), (5), (6), (7), (8) and (11) of the ruling letter dated May 9, 1958 (pertaining to the plaintiff's proposed judgment) apply in determining (i) the amount of the distribution to such holder, (ii) the manner in which such distribution will be taxed to such holder, and (iii) the basis and holding period of the General Motors stock (and/or substituted assets) and scrip in lieu of a fractional share received by such holder? In this connection, will a distribution of scrip in lieu of a fractional share of General Motors stock [fol. 1188] be treated as though a fractional share had actually been distributed at the time such scrip was distributed? Will the fair market value of such scrip be determined by the amount of cash payable therefor upon the surrender or expiration thereof? Will the amount of a distribution of scrip to a corporate holder and the basis thereof in the hands of such holder be determined by the adjusted basis in the hands of du Pont of the underlying shares of General Motors stock?

(b) To the extent that du Pont makes distributions under Section 301(b)(1) at different times during a taxable year, if the total of such distributions is in excess of du Pont's current and accumulated earnings and profits, will the amount constituting a dividend to each stockholder be determined in the manner provided in Section 1.316-2(b) and (c) of the Regulations?

(c) Will the basis of each share of du Pont Special Common received by a holder of du Pont Common pur- [fol. 1189] suant to an approved application for take-down be the same as the basis of the share of du Pont Common surrendered therefor, less the amount of any concurrent distribution required by Section 301(c)(2) to be applied against such basis?

(d) Will the holding period of du Pont Special Common received by a holder of du Pont Common pursuant to an approved application for take-down include the holding period of the du Pont Common surrendered therefor?

(e) Will the amount distributed to each holder of

du Pont Common pursuant to an approved application for take-down, to the extent constituting a dividend, be eligible for the credit, exemption and deduction as provided by Sections 34, 116 and 243?

11. If the answer to Question 3 is in the negative, what will be the answers to the questions set forth in Question 10 (to the extent the same remain applicable under the answer to Question 4)?

12. Will the holding period of a full share of General Motors stock acquired by the aggregation of scrip which [fol. 1190] was purchased in whole or in part begin with the latest date on which any part of such scrip was purchased?

13. Will cash paid by du Pont in exchange for scrip upon the surrender or expiration thereof if not aggregated be treated as a full payment to a holder of du Pont Common in exchange for such scrip, subject to the provisions and limitations of Subchapter P of Chapter I of the Internal Revenue Code of 1954?

14. With respect to a distribution to a corporate holder of du Pont Common pursuant to an approved application for take-down, will (a) earnings and profits, (b) accumulated taxable income under Section 535, and (c) undistributed personal holding company income under Section 545, be determined only by the amount which is includible in the gross income of such holder?

15. Will any income or loss be realized by du Pont upon or by reason of the surrender and cancellation of du Pont upon or by reason of the surrender and cancellation of du Pont Common, the issuance of du Pont Special Common, the distribution of full shares of General Motors shares (and/or substituted assets) and scrip or cash for fractional shares or General Motors income pursuant to approved applications for take-downs?

16. Will the earnings and profits of du Pont be decreased each year by the amount of any cash and the adjusted bases of any General Motors stock (and/or substituted [fol. 1191] assets) distributed in a particular year and by the adjusted bases of full shares of General Motors stock underlying scrip distributed in a particular year?

D. Documentary Stamp Tax Consequences

17. With respect to documentary stamp taxes—

(a) Will any documentary stamp tax liability be incurred by du Pont upon or by reason of the designation of the number of General Motors shares reserved for general corporate purposes or of the establishment of separate and independent accounts for General Motors shares allocated for take-downs?

(b) Will any documentary stamp tax liabilities attach upon the issuance of shares of du Pont Special Common?

(c) Will any documentary stamp tax liabilities attach upon the surrender for cancellation and extinguishment of shares of du Pont Common pursuant to the approved applications for take-down?

(d) Will documentary stamp tax liabilities attach upon the distribution of General Motors stock at the [fol. 1192] at the minimum rate on the ground that the distributions will not be "sales"?

(e) Will any documentary stamp tax liabilities attach upon the distribution of scrip representing a fractional share of General Motors stock?

(f) Will any documentary stamp tax liabilities attach upon a sale or other transfer to other than du Pont of scrip for less than a full share, or will such liabilities attach only to such a sale or transfer under a single bill of sale of scrip to the extent representing full shares?

(g) Will any documentary stamp tax liabilities attach upon the surrender of scrip for cash or in respect of the scrip upon its surrender after aggregation for full shares of General Motors stock?

(h) Will documentary stamp tax liabilities attach upon the distribution of full shares of General Motors stock in return for scrip which has been aggregated at the minimum rate?

[fol. 1193] (i) Will any documentary stamp tax liabilities attach in respect of any other proposed transaction?

III. Request for Prompt Ruling

Because of the broad public interest in the disposition of this case, it is requested that the ruling letter issue as promptly as possible. (It is anticipated that this cause will come on for hearing before the District Court in October, 1958.)

IV. Additional Information and Request for Conference

Should any additional information be required, it is requested that you telephone collect either Mr. Andrew J. Dallstream, CEntral 6-4500, Chicago, Illinois, or Mr. Daniel M. Gribbon, counsel for du Pont, REpublic 7-5900, Washington, D. C., who will see that such information is promptly provided.

The privilege of a conference is requested with notice thereof to Messrs. Dallstream, Gribbon and George D. Reycraft (Antitrust Division, Department of Justice, Washington, D. C.), who will notify all other parties.

[fol. 1194] It will be appreciated if a copy of the ruling letter can be provided to each of the undersigned.

Respectfully, E. I. Du Pont De Nemours and Company, Wilmington 98, Delaware. By /s/ C. A. Kline, Jr., First Assistant Treasurer. Christiana Securities Company, Wilmington, Delaware. By /s/ E. H. Tinney, Secretary. Delaware Realty & Investment Company, Wilmington, Delaware. By [fols. 1195-1348] /s/ E. H. Tinney, Secretary. /s/ Manuel E. Cowen, amicus curiae, One North La Salle Street, Chicago 2, Illinois. /s/ Andrew J. Dallstream, amicus curiae, 231 South La Salle Street, Chicago 4, Illinois.

[fol. 1349] DALLSTREAM, SCHIFF, HARDIN, WAITE & DORSCHEL
231 South La Salle Street,
Chicago 4, Illinois

CEntral 6-4500,
Cable address
Dall Schiff

October 20, 1958.

Commissioner of Internal Revenue,
Washington 25, D. C.
Attention T:R:R-ES
Re: United States of America v. E. I. du Pont de Nemours and Co., Inc.

Dear Sir:

Memorandum in Support of Rulings Requested in Letter of September 25, 1958

The request for rulings filed on September 25, 1958 requests rulings by the Commissioner of Internal Revenue on the tax consequences of the Proposed Judgment submitted by Andrew J. Dallstream, Esquire, who was appointed by the Court in the du Pont antitrust case as amicus curiae to advise the Court with respect to the interests of the du Pont stockholders. The facts and supporting data have been set forth in full in the request filed September 25, 1958. [fol. 1350] Your attention is directed particularly to Exhibit 3 attached to the letter of September 25, 1958 at pages 12 through 17 where the text of Article VIII of the Proposed Judgment appears; and also to pages 8 through 14 in the body of the letter of September 25th where the "take down" provisions contained in Article VIII of the Proposed Judgment are described.

Requested Rulings

It is respectfully requested that the Commissioner rule on the Federal tax consequences of the foregoing proposed judgment, as set forth below.

1) That no income or loss will be realized by du Pont or any stockholder of du Pont, or by Christiana or Delaware or any stockholder of Christiana or Delaware, upon or by reason of —

(a) the entry of the Proposed Judgment; or

(b) the designation by du Pont, pursuant to paragraphs (a) and (b) of Article VIII of the Proposed Judgment, of the number of GM shares reserved for general corporate purposes; or

(c) the establishment upon du Pont's books of separate and independent accounts for the GM shares allocated for take-downs; or

[fol. 1351] (d) the amendment of the du Pont certificate of incorporation creating du Pont Special Common, as provided in paragraph (c) of Article VIII of the Proposed Judgment.

2) That no income or loss will be realized by any holder of du Pont Common by virtue of the creation, grant or exercise of the right set forth in paragraph (d) of Article VIII of the Proposed Judgment to apply for any part or all of his pro rata share of the GM stock* allocated for take-downs and of GM income prior to the time that such holder's application for take-down is approved by the District Court, and in this connection

(a) that income will be realized by a holder of du Pont Common in respect of a distribution pursuant to an approved application for take-down on the date that the delivery is made (or made available) by du Pont to such holder;

(b) that in the case of a holder of du Pont Common who dies before such distribution first becomes avail-[fol. 1352] able, the date on which the distribution pursuant thereto first becomes available will be controlling for purposes of determining (i) the gross income returnable in the decedent's final return, (ii) the decedent's gross estate for Federal estate tax purposes and (iii) the application of Section 691 of the Internal Revenue Code

3) That the delivery to a holder of du Pont Common, pursuant to an approved application for take-down, of full

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* Throughout this memorandum, references to GM shares allocated for take-down include reference to any assets substituted therefor.

shares of GM stock, of cash or scrip in lieu of a fractional share and of GM income will constitute a distribution under Section 301 of the Internal Revenue Code of 1954.

4) In view of the ruling requested on question No. 3, no ruling is requested with respect to question No. 4.

5) That no income or loss will be realized by a holder of du Pont Common upon or by reason of the receipt, pursuant to an approved application for take-down, of du Pont Special Common.

6) The ruling requested with respect to question No. 6 appears as subparts (a) and (b) of requested ruling No. 2.

[fol. 1353] 7) (a) That du Pont will be required to include in its gross income a distribution received by it in respect of GM shares allocated for take-downs, whether or not an application or applications for take-downs have been made, where the record date for such distribution occurs prior to the date on which an application or applications for take-downs by the holder or holders of du Pont Common have been approved by the Court.

(b) That du Pont will not be required to include in its gross income a distribution received by it in respect of GM shares allocated for take-downs, as to which an application or applications for take-downs have been approved where the record date for such distribution occurs after the date on which such application or applications for take-downs by the holder or holders of du Pont common have been approved by the Court and prior to the date on which delivery is made (or made available) by du Pont.

(c) That to the extent du Pont is required to include in its gross income a distribution received by it in [fol. 1354] respect of GM shares allocated for take-downs, it will be entitled to the deduction provided in Section 243 of the Internal Revenue Code with respect thereto.

8) That distributions by du Pont to holders of du Pont Common from GM income, other than in connection with approved applications for take-down, will constitute distributions by du Pont under Section 301 of the Internal Revenue Code and will be taxable at the time of each such distribution as therein provided.

9) That if du Pont, Christiana or Delaware receive any rights to acquire GM stock, a distribution of such rights to their respective stockholders will constitute distributions of property under Section 301, subject to the provisions of Sections 307 and 1223(5), and, that if du Pont, Christiana or Delaware sell such rights, gain or loss will be realized by the seller and taxable in accordance with the provisions of Sections 307, 1201(a) 1211(a) and 1223(5).

10) That, for the purpose of determining, with respect to the distribution of full shares of GM stock and of scrip in [fol. 1355] lieu of a fractional share to a holder of du Pont Common pursuant to an approved application for takedown, (i) the amount of the distribution to such holder, (ii) the manner in which such distribution will be taxed to such holder, and (iii) the basis and holding period of the GM stock and scrip in lieu of a fractional share received by such holder:

(a) the amount of the distribution to any non-corporate shareholder of du Pont, including those who are also shareholders of Delaware, will be the fair market value of the GM stock distributed to each such shareholder, including any fractional share to which a shareholder may be entitled (Section 301(b)(1)(A)). Fair market value will be determined as of the date of the distribution. (Section 301(b)(3)) The amount of the distribution to a non-resident foreign corporation will be the fair market value of the GM stock, including any fractional share, distributed to such a shareholder. [See Commissioner's prior ruling of May 9, 1958, ruling (4).]

[fol. 1356] (b) the amount of the distribution to each other corporate shareholder including Christiana and Delaware, will be the fair market value of the GM stock distributed to such shareholder, including any fractional share, or the adjusted basis of the distributed stock in the hands of du Pont, whichever amount is the lesser. (Section 301(b)(1)(B)).

(c) the amount of the distribution determined under Section 301(c)(2), and if in excess of the adjusted basis, to non-corporate shareholders, nonresident foreign corporate shareholders and all other corporate shareholders) will be treated as a dividend under Section 301(c)

(1) to the extent of du Pont's earnings and profits as defined in Section 316. The amount of any distribution which is not a dividend, will be applied against the adjusted basis of the du Pont stock as provided in Section 301(c)(2), and if in excess of the adjusted basis, the excess will be treated as gain from the sale or ex- [fol. 1357] change of property in accordance with Section 301(b)(3)(A). [See Commissioner's prior ruling of May 9, 1958, ruling (5).]

(d) the basis of the GM stock, including any fractional share, in the hands of a noncorporate shareholder of du Pont, will be the fair market value of such stock on the date of its distribution. (Section 301(d)(1)). The basis in the hands of a non-resident foreign corporate shareholder will be the fair market value on the distribution date. Under Section 301(d)(2), the basis of the GM stock in the hands of all other corporate shareholders, including Christiana and Delaware, will be the fair market value of the GM stock or its adjusted basis in the hands of du Pont, whichever is the lessor. [See Commissioner's prior ruling of May 9, 1958, ruling (6).]

(e) du Pont's identifiable bases of specific shares of GM stock where lower than market value will determine the amount of the distribution to a corporate shareholder (other than a non-resident foreign corporate shareholder) and will determine the basis of the [fol. 1358] GM shares in the hands of the corporate distributee provided that specific shares may be traced to a specific corporate shareholder. (Rev. Rul. 56-653, CB 1956-2, p. 185.) If specific shares may not be identified in the hands of any distributee, the distribution of all unidentifiable shares will be considered to have been made on a first-in first-out basis. (Section 1.1012-1 (c)(1) of the regulations.) [See Commissioner's prior ruling of May 9, 1958, ruling (7).]

(f) the holding period of the shares which will be distributed as a dividend, including any fractional share, will begin with and include the day following the date of recipt of such shares by each shareholder in whose hands the basis of such shares is market value.

(g) the holding period of the GM shares, including any fractional shares, distributed to a corporate share-

holder in whose hands the basis of such shares is the adjusted basis of the shares in the hands of du Pont, will include the period du Pont held the shares. (Section [fol. 1359] 1223(2)). [See Commissioner's prior ruling of May 9, 1958, ruling (8).]

(h) a distribution of scrip in lieu of a fractional share of GM stock will be treated as though a fractional share had actually been distributed at the time such scrip was distributed. The fair market value of such scrip will be determined by the amount of cash payable therefor upon the surrender or expiration thereof, and the amount of a distribution of scrip to a corporate holder will be determined by the adjusted basis in the hands of du Pont of the underlying shares of GM stock.

(i) to the extent that du Pont makes distributions under Section 301(b)(1) at different times during a taxable year, if the total of such distributions is in excess of du Pont's current and accumulated earnings and profits, the amount constituting a dividend to each stockholder will be determined in the manner provided in Section 1.316-2(b) and (c) of the Regulations. [See Commissioner's prior ruling of May 9, 1958, ruling (11).]

[fol. 1360] (j) the basis of each share of du Pont Special Common received by a holder of du Pont Common pursuant to an approved application for take-down will be the same as the basis of the share of du Pont Common surrendered therefor, less the amount of any concurrent distribution required by Section 301 (c)(2) to be applied against such basis.

(k) the holding period of du Pont Special Common received by a holder of du Pont Common pursuant to an approved application for take-down will include the holding period of the du Pont Common surrendered therefor.

(l) the amount distributed to each holder of du Pont Common pursuant to an approved application for take-down, to the extent constituting a dividend, will be eligible for the credit, exemption and deduction as provided by Sections 34, 116 and 243.

11) In view of the ruling requested with respect to question No. 3, no ruling is requested with respect to question No. 11.

[fol. 1361] 12) That the holding period of a full share of GM stock acquired by the aggregation of scrip which was purchased in whole or in part will begin with the latest date on which any part of such scrip was purchased.

13) That cash paid by du Pont in exchange for scrip upon the surrender or expiration thereof if not aggregated will be treated as a full payment to a holder of du Pont Common in exchange for such scrip, subject to the provisions and limitations of Subchapter P of Chapter 1 of the Internal Revenue Code of 1954.

14) That, with respect to a distribution to a corporate holder of du Pont Common pursuant to an approved application for take-down, (a) earnings and profits, (b) accumulated taxable income under Section 535, and (c) undistributed personal holding company income under Section 545, will be determined only by the amount which is includible in the gross income of such holder.

15) That no income or loss will be realized by du Pont upon or by reason of the surrender and cancellation of du Pont Common, the issuance of du Pont Special Com-
[fol. 1362] mon, the distribution of full shares of GM shares and scrip or cash for fractional shares or GM income pursuant to approved applications for take-downs.

16) That the earnings and profits of du Pont will be decreased each year by the amount of any cash and the adjusted bases of any GM stock distributed in a particular year and by the adjusted bases of full shares of GM stock underlying scrip distributed in a particular year.

17) That with respect to documentary stamp taxes—

(a) no documentary stamp tax liability will be incurred by du Pont upon or by reason of the designation of the number of GM shares reserved for general corporate purposes or of the establishment of separate and independent accounts for GM shares allocated for take-downs;

(b) no documentary stamp tax liabilities will attach upon the issuance of shares of du Pont Special Common;

(c) no documentary stamp tax liabilities will attach upon the surrender for cancellation and extinguish-
[fol. 1363] ment of shares of du Pont Common pursuant to the approved applications for take-down;

(d) documentary stamp tax liabilities will attach upon the distribution of GM stock at the minimum rate on the ground that the distributions will not be "sales";

(e) no documentary stamp tax liabilities will attach upon the distribution of scrip representing a fractional share of GM stock;

(f) no documentary stamp tax liabilities will attach upon a sale or other transfer to other than du Pont of scrip for less than a full share, but such liabilities will attach only to such a sale or transfer under a single bill of sale of scrip to the extent representing full shares;

(g) no documentary stamp tax liabilities will attach upon the surrender of scrip for cash or in respect of the scrip upon its surrender after aggregation for full shares of GM stock;

(h) documentary stamp tax liabilities will attach at the minimum rate up the distribution of full shares [fol. 1364] of GM stock in return for scrip which has been aggregated;

(i) no documentary stamp tax liabilities will attach in respect of any other proposed transaction.

Analysis in Support of Rulings Requested in Paragraphs (1) & (2) and (3) above

I. Ruling Requested in Paragraphs (1) & (2)

In paragraphs (1) & (2) above, it is requested the Commissioner rule:

> "That no income or loss will be realized by any holder of du Pont Common by virtue of the creation, grant or exercise of the right set forth in paragraph (d) of Article VIII of the Proposed Judgment to apply for any part or all of his pro rata share of the GM stock allocated for take-downs and of GM income prior to the time that such holder's application for take-down is approved by the District Court . . . [and] the distribution pursuant thereto first becomes available to such holder. . . ."

For the reasons set forth below, it is submitted this requested ruling should be issued.

The proposal for a procedure for the "take-down" of GM

shares, and the conditions and limitations on take-down are designed to satisfy the possible requirements of the District Court in carrying out the mandate of the Supreme Court under the Clayton Act. The proposal is not initiated by the [fol. 1365] management of du Pont. Instead, the proposed decree has first provided that du Pont's holdings of GM shares should be "sterilized" so that all voting rights of the GM shares will be removed from du Pont and vested in those who may be du Pont stockholders from time to time.

In addition, then, the proposal for a take-down procedure is designed to provide the Court a method whereby it may supervise the orderly and eventual severance from du Pont of these segregated GM shares. This take-down procedure differs from the procedure covered in ruling (3), page 7, of the ruling letter dated May 9, 1958, only in that the times for all distributions or take-downs are not fixed in advance, but will be established by the Court from time to time in the light of all relevant circumstances at each time. The Court can thus maintain complete control to insure conformance to the policies and requirements of the Clayton Act, and to insure the least adverse effects on the stockholders of both du Pont and GM and on general economic conditions.

At no time prior to delivery to him upon a Court approved application does any stockholder of du Pont have any right to receive any particular property or any fixed amount of property; nor can any value be assigned to his mere privi- [fol. 1366] lege of making an application which may be denied, and which, if granted at some indeterminable future time will relate to property the future value of which is only a guess. Further, the Court necessarily retains the right to impose conditions on any approval of an application, which makes it impossible to know in advance that the stockholder can receive property or what its value may be. In order to find that any stockholder has income prior to the time that delivery is made (or made available) to him under an approved application, it would be necessary to find that the stockholder has an unconditional right to take—whenever he alone wants to—property which has an ascertainable value—in other words, that he has "constructively received" the property prior to

the time that he gets around to taking it. There can be no constructive receipt under this proposed decree.

Under the doctrine of constructive receipt a taxpayer is taxed on income which, though not yet reduced to possession, is unqualifiedly subject to his demand. Mr. Justice Frankfurter, sitting as Circuit Justice in *Ross* v. *Commissioner*, 169 F.2d 438, 491 (1st Cir. 1948), stated the basic rule as follows: "the Treasury may subject income to taxation when the only thing preventing its reduction to possession is the volition of the taxpayer." The doctrine, he [fol. 1367] declared, treats as taxable "any income which is unqualifiedly subject to the demand of a taxpayer on the cash receipts and disbursements method of accounting, whether or not such income has actually been received in cash" (*id.* at 490). See also *Weil* v. *Commissioner*, 173 F.2d 805 (2d Cir. 1949); *Lucas* v. *North Texas Co.*, 281 U.S. 11 (1930) (profit on sale of land held taxable only when the selling taxpayer had an unconditional right to compel performance by the purchaser). The same rules apply to an accrual basis taxpayer who does not accrue income (prior to receipt) until he is entitled to receive it.

The Treasury Regulations have incorporated this doctrine in correlative terms by making it inapplicable where "substantial limitation or restriction" exists on the taxpayer's right to receive the income. Regs. § 1.451-2 provides in part:

> "Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is accredited to his account or set apart for him so that he may draw upon it at any time. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions."

In regard to dividends, the Regulations state that "dividends on corporate stock are constructively received when unqualifiedly made subject to the demand of the share-[fol. 1368] holder," and that dividends of savings and loan associations are not constructively received if "not available for the shareholder's free and unrestricted use at the time credited." The Regulations thus express the widely-recognized principle that income is taxable to a

shareholder only when it is unqualifiedly subject to his demand. See *Earl R. Wilkinson*, 29 T.C. No. 45 (Dec. 6, 1957), Government's appeal dismissed, 9th Cir.; *Francis Metal Door & Window Corp.*, B.T.A. Memo. P-H Para. 48, 211 (1948), aff'd, 178 F.2d 405 (2d Cir. 1949).

Income is not constructively received where the actual payment to the taxpayer lies in the discretion of an independent party. Such cases involve salary payments or other compensation where actual receipt of the funds is delayed. *E.g., Joseph W. Johnson*, 25 T.C. 499, 502-03 (1955); *Samuel Keller Jacobs*, 22 B.T.A. 1166, 1169 (1931). The same rule applies to dividends. *Korfund Co., Inc.*, 1 T.C. 1180 (1943). In every instance where income has been taxed on the ground it was constructively received, the delayed receipt has been due to the taxpayer's own wish or intention. Where the delay involves no fact or event other than the taxpayer's decision, the doctrine of course clearly applies and the income is taxed before actual receipt. See *Joseph Frank*, 22 T.C. 945, 953 (1954); *Daniel Shay*, B.T.A. Memo, P-H Para. 40, 238 (1940); *G.C.M. 13193*, 1934-1 C.B. 218.

[fol. 1369] Moreover, where an independent third party is in a position to delay the receipt of income by a taxpayer, inquiry will not be made into the likelihood whether receipt will in fact be delayed. In *Glore* v. *United States*, 54-2 USTC par. 9593 (N.D. Ill. 1954), the Commissioner had treated liquidating dividends paid by one corporation to the individual taxpayer in 1944 as income received in 1943 by another corporation which had itself been previously liquidated and its assets distributed to the taxpayer. These assets included stock of the corporation whose liquidating dividends were in controversy. The Court held that the stockholders of the corporation paying the liquidating dividends could have, at any time before payment of the dividends, rescinded the plan to liquidate. Thus, no stockholder, such as taxpayer, had a right to the dividends before they were declared.

The decision in another recent case is especially applicable to the present proceeding. In *Nitterhouse* v. *United States*, 207 F.2d 618, 620 (3d Cir. 1953), actual payment of funds was contingent upon a determination by a court of a clear title to land. This condition prevented application of

the doctrine of constructive receipt and the taxable event was postponed until actual payment had been received, even though it could have been reasonably anticipated there that the court would make such a determination.

[fol. 1370] Where the courts have considered the tax consequences of the actual receipt of items other than cash, the doctrine of constructive receipt has never been applied so as to impose a tax before the property could be converted into cash at the sole discretion of the taxpayer. Thus where tangible evidence of a claim is reduced to possession by the taxpayer, subject to a restriction on alienation or collection, no income is received until the restraint is removed and the debt may be reduced to cash in the unfettered discretion of the taxpayer. Nor is income constructively received where shares of stock are actually received as payment for services, but subject to the condition that they be held by the taxpayer for a stated period. *Propper* v. *Commissioner*, 89 F.2d 617 (2d Cir. 1937). Similarly, the doctrine does not apply where ascertainable shares of stock are credited each year to an employee's account to become unconditionally his only at the end of a certain number of years employment. *Fred C. Hall*, 15 T.C. 195, *aff'd*, 194 F.2d 538 (9th Cir. 1952); *Olson* v. *Commissioner*, 67 F.2d 726 (7th Cir. 1933), *cert. denied*, 292 U.S. 637 (1934); *Adolph Zukor*, 33 B.T.A. 324 (1935).

This line of authority, although sometimes couched in terms of ascertaining the market value, if any, of the property actually received, best illustrates the reluctance of [fol. 1371] the courts to tax income before it clearly and unqualifiedly becomes subject to the taxpayer's demand in an ascertainable amount. Thus, specific shares of stock may either be credited to the account of or actually delivered to a shareholder subject to conditions which impair his complete dominion and control over the shares and thus delay the taxable event. However, even if such conditions do not prevent the use of the shares by the taxpayer to obtain cash, income will not be constructively realized and taxed prior to the termination of the conditions. For example, in *Phillip W. Haberman*, 31 B.T.A. 75, *aff'd*, 79 F.2d 995 (2d Cir. 1935), taxpayer's compensation consisted partly of rights to purchase stock at less than its fair market value. Stock certificates were, however, immediately issued to

taxpayer who endorsed them and deposited them with the corporation to secure a loan for their full purchase price. On the subsequent repayment of the loan and provided taxpayer remained in the employ of a subsidiary of the corporation, he received the shares free and clear. The court held that taxpayer received income only as the loans were repaid and not in the year in which the stock was issued. To the same effect is *Fred S. Olson*, 24 B.T.A. 702 (1933) *aff'd*, 67 F.2d 726, *cert. denied* 292 U.S. 637. There an employment agreement called for the issuance of 200 [fol. 1372] shares of stock to the employee in consideration for services over a five-year period. In each of the five years forty shares of stock were issued in the employee's name and delivered to a trustee designated by him. Here, too, the court found no constructive receipt and none of the shares were included in the employee's taxable income until the end of the five-year service period despite the possible use of the shares as collateral.

It is thus apparent that only "in unique circumstances" may the doctrine of constructive receipt be invoked. *Hal E. Roach*, 20 B.T.A. 919, 924 (1930); *John A. Bander*, 3 B.T.A. 231; *C. E. Gullett*, 31 B.T.A. 1067; *Adolph Zukor, supra.* Such circumstances require that "a taxpayer [turn] his back upon income or . . . not choose to receive income which he could have if he chose." *Cecil Q. Adams*, 20 B.T.A. 243, *aff'd*, 54 F.2d 228 (1st Cir. 1931).

Consideration of the "take-down" procedures contemplated by Article VIII of the proposed judgment demonstrates clearly that the doctrine of constructive receipt cannot be applied so as to tax any du Pont shareholder prior to the time his take-down application is approved by the District Court and delivery is made (or made available) to him.

[fol. 1373] Under the provisions of Article VIII of the Proposed Judgment, a du Pont shareholder will have merely a "privilege to apply" for his pro rata share of the GM stock allocable for "take-down." His right to obtain any portion of such stock will depend upon findings of the District Court made on the basis of data submitted by all parties. The considerations which must be examined by the District Court, the findings which it must make, and the conditions which it might impose prevent the shareholder

from having a right (a) to an ascertainable number of shares with an ascertainable value or (b) to receive any shares at all in a given taxable year. Extensive research has failed to disclose a single authority suggesting the constructive receipt of income prior to an event which establishes the absolute right to a specific amount of income on a given date.

The District Court is an "independent third party" which is empowered to determine both "whether" and "when" any GM shares shall be distributed to any du Pont stockholder. Power to declare or withhold a dividend of the GM stock will be in the District Court. Thus, the most that could be said with respect to the entry of the Proposed Judgment is that it will, figuratively speaking, cause GM stock to be credited provisionally to each du Pont shareholder's ac- [fol. 1374] count on the Company's books. As discussed above, such an act of crediting to a shareholder's account, without more, is devoid of significance so far as the constructive receipt of income is concerned. Something more is needed—the stock must be available to the shareholders. However, there is no availability until the Court approves a take-down application. The very existence of this power in the District Court to approve or disapprove take-down applications is in itself sufficient to prevent the prior constructive receipt of the stock.

Court approval can neither be assumed nor dismissed as a formality. In considering each application, the Court will be required to determine whether take-down would have such economic consequences on the market for GM stock that it should be denied in whole or in part, and this is a serious question. An enormous amount of GM stock—approximately 50 million shares with a current market value of over 2 billion dollars—will be made subject to take-down upon entry of the Proposed Judgment. The possible disruption in the market for the stock if take-downs are approved in substantial quantities or with poor timing is a serious factor that will be considered carefully by the District Court. Any individual stockholder will thus have no way of knowing whether, when and to what extent his application [fol. 1375] may be approved by the District Court. For one thing, his own chances of approval will be substantially influenced by the number and character of other applications

that will be made, a factor over which the individual stockholder will have no control.

Of at least equal importance is the further condition of Section (f)(2) that the Court determine "whether approval of each application would be consistent with the purposes and provisions of this Judgment." The final judgment to be entered by the District Court will culminate an antitrust action that may well have been the most important brought by the Government in many years. In passing upon applications for "take-down" the District Court, to insure compliance and achieve the objectives of its Judgment, would necessarily be compelled to consider whether approval of an application is consistent with the overall purposes of that judgment. This will be no light task. It will require an analysis and understanding of the consequences that may result from denial or approval of take-down applications involving shareholders who find themselves in a variety of circumstances. In each instance the approval of a take-down application will have to be viewed as part of the Court's primary function of assuring compliance with its antitrust judgment. The parties to the judgment, including the United States, will be available [fol. 1376] to assist the Court in making these decisions and it may reasonably be expected that such assistance will be called for periodically.

In addition to the specific standards of Section (f)(1) and (2) the broadest discretion is granted the District Court by Section (f)(4) which permits the Court in passing upon applications to consider "such other factors as may appear relevant at the time each application is considered." This unqualified discretion in the Court to consider any factors "as may appear relevant" underscores the fact that a du Pont shareholder's "right" to his pro rata shares of GM stock is anything but unqualified until the order of approval is entered.

II. Ruling Requested in Paragraph (3)

In paragraph (3) above it is requested that the Commissioner rule:

> "That the delivery to a holder of du Pont Common, pursuant to an approved application for take-down, of full shares of GM stock, of cash or scrip in lieu of a

fractional share and of GM income will constitute a distribution under Section 301 of the Internal Revenue Code of 1954."

For the reasons set forth below, it is submitted that this requested ruling should be issued.

In the ruling dated May 9, 1958 concerning the tax consequences of the Proposed Judgment of the Department of [fol. 1377] Justice in this case, the Commissioner held that distributions of GM stock to du Pont shareholders in ten equal installments would be treated as distributions of property under Section 301 of the 1954 Code. In lieu of the fixed schedule of distributions under the Proposed Judgment of the Department of Justice, the judgment proposed by Amicus Dallstream provides for distributions of the GM stock allocable to each share of du Pont stock from time to time as determined by the District Court upon applications made by the du Pont shareholders.*

In both cases the result is the same. Under the Government's Proposed Judgment there would be a fixed annual distribution ratably on each share of du Pont stock; and at the end of ten years there would have been distributed upon each share of du Pont stock the same portion of the "pot" of GM shares. Under Amicus Dallstream's proposal, the distribution at any one time will not be ratable on all du Pont shares, but ultimately there will have been distributed upon each share of du Pont stock approved for take-down the same portion of the "pot" of GM shares. There is a difference only in mechanics and not in substance since the same portion of the "pot" will be allocated for distribution upon each share of du Pont stock and distributed thereon when approved for take-down."

[fol. 1378] Where distributions of money or property to shareholders are made in amounts proportionate to their stock interests, the fact, alone, that there are variations among shareholders with respect to the time when such distributions are made does not change the nature of such payments for tax purposes. Compare, for example, Sec-

*Exclusive of the stock designated by du Pont to be held for general corporate purposes under Article VIII of the Proposed Judgment.

tion 302(b)(2)(D) of the Code, which excepts from treatment as an exchange "any redemption made pursuant to a plan the purpose or effect of which is a series of redemptions resulting in a distribution which (in the aggregate) is not substantially disproportionate with respect to the shareholder."

The judgment proposed by Amicus Dallstream provides that the income from the shares of GM stock allocated for "take-downs" shall at all times be held for the benefit of those stockholders as to whom "take-downs" have not yet been approved and distributions made. Once a stockholder's application for "take-down" has been approved and distributions made, he is no longer entitled to participate in the dividends declared on the GM shares held for "take-down." The effect of this provision is to recognize that a prorated dividend in GM shares is being held by du Pont for the benefit of all present stockholders, payable only upon approval of their applications by the Court. Accordingly, du Pont would be required to maintain separate [fol. 1379] accounts for the GM stock that is to be distributed to shareholders. Also, since du Pont stock is widely held and actively traded, the judgment proposed by Amicus Dallstream contains certain provisions to facilitate identification of the shares of du Pont stock with respect to which the distribution of GM shares has already been made. It would be impossible to maintain a market in du Pont shares if there were no simple and certain means for distinguishing between those shares still entitled to apply for a take-down and those shares on which the take-down has been approved and received. The fact of distribution would be evidenced by a new stock certificate of "du Pont Special Common", which would represent precisely the same stock interest in the du Pont Company as was represented by the original certificate, except for the right to receive the distribution of the allocable share of GM stock, and except for the right to share in GM income which the holder of the distributed GM shares will thereafter receive directly.

The only purpose of these provisions is to provide a practical means for effecting a distribution to du Pont stockholders of their allocable portion of the GM stock. None of these provisions would affect in any way the character of the proposed distributions of GM shares as divi- [fol. 1380] dends. Treatment of the distributions of GM

stock as distributions taxable under Section 301 seems clearly required on the basis of both principle and authority.

The leading case of *Bazley* v. *Commissioner*, 331 U.S. 737 (1947), held that a distribution by a corporation of its debentures in connection with an exchange of its outstanding stock for stock of a different class was taxable as a dividend under the Internal Revenue Code of 1939, regardless of the fact that there was "a recapitalization of the Bazley corporation in the sense that the symbols that represented its capital were changed."

Under similar facts, *Heady* v. *Commissioner*, 162 F.2d 699 (7th Cir. 1947), held that the distribution constituted a dividend under Section 115 of the 1939 Code. The decision emphasizes that the nature of the distribution is determined by its "ultimate effect" and that the motive for the transaction is not material.

Similar dividend treatment is accorded even where substantial changes in a corporation's capital structure are made. In the case of a distribution of cash or property other than a corporation's own securities, the principle was established long prior to the *Bazley* case that the distribution might constitute a dividend even though the corpora-[fol. 1381] tion's capital structure was concurrently modified. For example, see *H. Y. McCord*, 31 B.T.A. 342 (1934), which held that a distribution of cash constituted a dividend although it accompanied a reduction in the corporation's capital and the substitution of new common and preferred stock for the old common stock. *Accord*, *G.C.M.* 8175, IX-2 C.B. 134 (1930).

The point seems completely clear. The only reason for discussing it is that mechanically the judgment proposed by Amicus Dallstream differs from the Government's Proposed Judgment in that the certificate representing a du Pont share on which GM shares have already been distributed will have to bear some mark distinguishing them from other shares. This will be accomplished by replacing the old certificate with a new certificate of Special Common at the time of delivery under an approved application. It seems apparent that the issuance under the Proposed Judgment of new pieces of paper to evidence the fact that distribution of the allocable portion of the GM stock already has been made on these particular shares has no significance apart from the payment of the dividend and does not consti-

tute a "recapitalization" or other form of "reorganization" for tax purposes. It has no more significance than a receipt for the distribution which might be stamped on the old certificates.

[fol. 1382] These paper changes, having no significance apart from the dividend, do not appear to constitute any form of "exchange" under Subchapter C. However, even if the paper changes must be viewed as some form of exchange, the distribution of the GM stock in any event constitutes a distribution under Section 301. This result is required by Section 1.301-1(1) of the Regulations, which states:

> "A distribution to shareholders with respect to their stock is within the terms of section 301 although it takes place at the same time as another transaction if the distribution is in substance a separate transaction whether or not connected in a formal sense. This is most likely to occur in the case of a recapitalization, a reincorporation, or a merger of a corporation with a newly organized corporation having substantially no property. For example, if a corporation having only common stock outstanding, exchanges one share of newly issued common stock and one bond in the principal amount of $10 for each share of outstanding common stock, the distribution of the bonds will be a distribution of property (to the extent of their fair market value) to which section 301 applies, even though the exchange of common stock for common stock may be pursuant to a plan of reorganization under the terms of section 368(a)(1)(E) (recapitalization) and even though the exchange of common stock for common stock may be tax free by virtue of section 354."

For the foregoing reasons it is submitted that the ruling requested in paragraph (3) above should be issued.

[fol. 1383] Conclusion

Only these two points are covered in the analysis as it is believed the remaining requested rulings depend upon them or follow under the letter of May 9, 1958.

If there are questions on any other points, we shall be pleased to submit further authorities.

Respectfully, —— ——.

[fol. 1384] DALLSTREAM, SCHIFF, HARDIN, WAITE & DORSCHEL
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Cable Address
Dallschiff

March 4, 1959.

Chief Counsel,
Internal Revenue Service,
Internal Revenue Service Building,
Washington 25, D. C.

Re: Request for a Ruling by the Commissioner of Internal Revenue on the Proposed Final Judgment submitted by Andrew J. Dallstream, Amicus Curiae, in the case of U.S. v. du Pont, et al.

Dear Sir:

At the conference held on February 9, 1959, in the Conference Room of the Office of the Chief Counsel in the Internal Revenue Servic Building in Washington, certain views were expressed as to the time when holders of du Pont Common stock would first realize income under the Judgment proposed by Mr. Dallstream, which views were at variance with the position which Mr. Dallstream, the other Amicus Curiae, Mr. Cowen, du Pont, Christiana and Delaware were asking the Commissioner to take.

[fol. 1385] It became apparent, in the course of the discussion, that there were some differences of opinion as to the interpretation of the Proposed Judgment which was the subject matter of the request for ruling, and Mr. Dallstream agreed to submit certain clarifying amendments to his Judgment, in order that it might more clearly express his intentions. A copy of the Proposed Judgment, as amended, is appended to this letter, and the original request for ruling, as well as the memorandum in support thereof heretofore filed, should accordingly be taken as amended to reflect these changes.

The amendments made do not include the placing of any arbitrary time limit on the duration of the "take-down" program. Mr. Dallstream considers it important to retain in the anti-trust court the power to terminate the take-down program whenever, in the judgment of the court, the circumstances are such that it would be appropriate or necessary to modify the Judgment.

Article I, paragraphs (c) and (d) were amended in minor particulars. Article I, paragraphs (f) through (i) were amended to better express the intended meanings of certain [fol. 1386] terms used in Article VIII. Article IV, paragraph (a), subparagraphs (1) and (2) were amended in minor particulars. Article VI, paragraph (b) was amended and the introductory paragraph of Article VIII and paragraphs (a) through (d) of Article VIII have been rewritten. Article VIII, paragraph (f) was amended in minor particulars, and Article IX was amended.

The primary purpose of all of the amendments has been to emphasize that upon the entry of the Proposed Final Judgment the General Motors shares owned by du Pont and designated as available for the operation of the take-down plan remain the property of the du Pont corporation, remain subject to the claims of creditors of du Pont including both creditors with claims outstanding at the time of the adoption of the plan as well as creditors whose claims thereafter attach, and also remain subject to the rights of preferred stockholders of du Pont whether they become holders before or after the adoption of the plan, and whether their preferred shares were authorized and issued before or after the adoption of the plan. A further objective in these amendments has been to remove any and all controls by [fol. 1387] the holders of du Pont Common shares over du Pont's freedom of action with respect to the General Motors take-down shares.

A final point included in the amendments is a requirement that any holder of Common shares who is permitted to take down General Motors shares tender and file, duly executed by him, a Form 906 Closing Agreement containing such provisions as will bind him irrevocably to the tax treatment of the transaction set out therein. The content of such Closing Agreement is to be worked out with your office.

It is believed that these clarifying amendments amply justify the reconsideration of the view taken at the conference that holders of du Pont Common shares would realize gross income in the form of a dividend under the Proposed Final Judgment and prior to the time when their respective applications for take-down of General Motors take-down shares might be approved.

A supplemental legal memorandum is attached dealing with the question raised at the conference whether, under

the Judgment, there would be a distribution to the holders [fol. 1388] of du Pont Common which would cause them to realize gross income immediately upon the entry of the Judgment.

Yours truly, Andrew J. Dallstream, Amicus Curiae by appointment of the District Court.

[fol. 1389] This memorandum is submitted in support of the proposition that upon the District Court's entry of the Proposed Final Judgment* du Pont will not have distributed any property to its stockholders, and its stockholders will not have received any property—in other words, that no holder of du Pont Common stock will realize income by virtue of the entry of the Judgment unless and until such holder's application for take-down has been approved by the District Court.

I. Du Pont will not have distributed any property upon the entry of the Judgment.

In order to rule that stockholders of du Pont receive a dividend upon the entry of the Judgment, the Commissioner must find that there would be a distribution or diminution of du Pont's assets or earnings at that time. See *Palmer* v. *Commissioner*, 302 U. S. 63, 69-71 (1937), and Sections 301 [fol. 1390] and 316(a), I. R. C. It will be demonstrated in this Part I that du Pont's rights in the General Motors take-down shares will not be materially affected by the Judgment and that, therefore, there will be no distribution in any practical sense of the take-down shares.

A. The General Motors take-down shares would remain the property of du Pont and would be available for any proper corporate purpose.

The Proposed Judgment does not call for any segregation of the General Motors take-down shares from the other

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*"Proposed Final Judgment," "Proposed Judgment" or "Judgment," as used in this memorandum, means the Proposed Final Judgment submitted to the District Court by Andrew J. Dallstream, as the same has been amended by Mr. Dallstream. See letter dated March 4, 1959, addressed to the Chief Counsel, Internal Revenue Service, and the attachments thereto.

assets of du Pont. The take-down shares remain subject to the risks of du Pont's business and remain available to its general creditors and preferred stockholders. No control over the disposition of the shares is given any of the du Pont stockholders. These attributes are entirely and totally inconsistent with the concept of a distribution.

In this connection it may be well to consider some of the provisions of the Proposed Judgment which bear on the question. The second sentence of paragraph (a) of Article VIII provides that General Motors shares presently owned by du Pont and not reserved by du Pont shall be available, [fol. 1391] until disposed of by du Pont, for the operation of the take-down plan. The next sentence provides that these shares remain assets of du Pont subject to the risks of the business of du Pont and to the control of du Pont.

The subsequent amendments of the du Pont charter required by Paragraph (c)(1) would not change any aspect of du Pont's control over the shares. The required amendments would simply authorize a Special Common stock, none of which would be immediately issued, but which might be issued in the future, in lieu of old Common, to those Common holders who are permitted to receive a dividend in take-down shares and/or substituted assets, to evidence that they have received the shares and are not entitled to apply for further take-down.

B. The Judgment would not make du Pont a trustee of the General Motors take-down shares for the benefit of its Common stockholders.

The Judgment would not operate to transfer any take-down shares from du Pont, as a business corporation, to du Pont, as a trustee (even assuming, which is contra to the fact, that du Pont had the legal power to act as a trustee), There would be no trust agreement or declaration of trust. There would be no provision for the issuance of shares or [fol. 1392] certificates of beneficial interests. No legal or equitable interest in the take-down shares or any other assets would be acquired by the holders of du Pont Common. All legal and equitable property rights with respect to the shares would remain in du Pont.

1. An essential element of a trust is the manifested intention to create a trust relationship; this element is not present here.

An essential element of every trust is the manifested intention of the settlor to create a trust, and to impose upon himself or some other person the duties of a trustee. See Restatement of the Law of Trusts, Section 2, and 1 Bogert, Trusts and Trustees, Section 45 (1951). Certainly, nothing in the Judgment would indicate an intention by the District Court to impose trust duties upon du Pont or to change the normal corporate relationship between du Pont and its stockholders,* and since the creation of a trust [fol. 1393] relationship is not necessary in order to provide an adequate remedy in the du Pont case a trust should not be presumed.

2. The relationship between du Pont and its Common stockholders would not be changed by the Judgment in any significant aspects.

Under recognized concepts of trust law, no trust, either express or implied, will be created for the benefit of the du Pont stockholders by the Proposed Judgment. There will be no segregated fund held for their benefit. The General Motors take-down shares will at all times be the property of du Pont, as they have been in the past, subject to claims of creditors of du Pont, and subject to disposition** by du Pont for any proper corporate purpose. A record of the amount of the shares or their proceeds, of course, will

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* All references in the original version of the Proposed Final Judgment which might have tended to create the impression that a trust relationship existed (e.g., the first sentence of paragraph (c)(1) and the last sentence of paragraph (c)(2) of Article VIII) have been deleted in the amended version of the Judgment so as to clarify the fact that no trust is intended.

** Du Pon't power of disposition over both take-down shares and reserved shares would be subject to approval by the District Court, but this requirement is included only for anti-trust reasons.

be maintained to satisfy the decretal obligation of du Pont under the take-down plan. But the maintenance of such a record cannot be said to amount to the creation of a trust. At most, such record affects only stockholder relations under corporate law; it makes no transfer that would bring to bear trust or other concepts of property law.

[fol. 1394] It may be worthwhile in this connection to consider some basic distinctions between a trust, which involves beneficial ownership by the cestui que trust in a specific res, and other legal relationships.

Scott on Trusts (2nd Ed., 1956), Section 12.1 states:

> "A trust involves a duty to deal as a fiduciary with some specific property for the benefit of another. A debt involves a merely personal obligation to make payment of a sum of money to another. * * * If the trustee transfers the trust property to a person who is not a bona fide purchaser, or if the trustee becomes insolvent, the beneficiary is still entitled to the property; * * *."

and in Section 12.6 it is said:

> "* * * If the money is held in trust, and the trustee becomes insolvent, the beneficiary is entitled to the money if he can identify it in the hands of the trustee or if he can trace it into a product. He need not share it with the creditors of the trustee; and if the trustee is a bankrupt, the money does not become a part of the estate to be distributed among the creditors. On the other hand, if a debt was created, the creditor is entitled to no priority over other creditors, even though the money lent is still in the hands of the debtor. * * *"

It is apparent that these characteristics do not exist in what is here suggested might amount to a trust. If du Pont becomes insolvent the General Motors shares or their proceeds will not go to any beneficiaries of a trust, but rather to du [fol. 1395] Pont's creditors. Such shares or their proceeds are available at all times prior to the approval of specific take-downs in order to supply du Pont's capital requirements. Not only are the stockholders' rights not prior to claims of general creditors under the plan, but in fact are *subordinated* to them. This is entirely inconsistent with any concept of a trust.

Scott on Trusts (2nd Ed., 1956), Section 12.2 states:

> "It often happens that the parties to a transaction do not make it perfectly clear whether they intend by the transaction to create a debt or a trust. The test is whether they intended that the person receiving the money should have the beneficial as well as the legal interest in it. If he was intended to have the beneficial and legal interests, if he was intended to have the use of the money as his own and to be under a merely personal liability to pay the money to the payor or to a third person, a debt is created. If, on the other hand, it was intended that the beneficial interest in the money should remain in the payor or should pass to a third person, a trust is created. Where the language of the parties does not clearly show their intention, all the circumstances must be considered in order to determine whether a debt or a trust was intended. * * * "

In the instant case the intention is perfectly clear. No trust is intended by the Proposed Judgment. None can then be said to have been created when nothing more than a contingent obligation to pay a dividend arises.

[fol. 1396] Even apart from other considerations discussed above, the absence of a trust is clear from the right of du Pont to satisfy whatever obligations are created by the Proposed Judgment out of substituted assets. This right stems from the continuation of the authority of du Pont's Board of Directors to sell the General Motors shares without the concurrence of any segment of its stockholders. *Scott on Trusts* (2nd Ed., 1956), Section 14.1 explains that this is definite indication that no trust is created.

> " * * * The question of a distinction between a trust and a contract for the benefit of a third party frequently arises where money is paid by one person to another who undertakes to make payment to a third person. If A pays money to B with the understanding that the money is to be kept in a separate fund and ultimately paid to C, B holds the money in trust for C. In such a case the beneficial interest in the money passes immediately to C, and never passes to B. The situation is different from that in which B is permitted to use the money for his own purposes, undertaking merely

> to pay a similar sum to C, in which case a trust is not created, but there is a contract for the benefit of C. • • • "

A conclusion that no trust is created seems inescapable. The take-down shares are not, as a result of the Judgment, held by du Pont in a manner bearing any resemblance to or any characteristics of a trust. The satisfaction of the rights [fol. 1397] of du Pont stockholders would be wholly contingent on Court action. Furthermore, any stockholders' rights involved exist inherently in the stockholders' investment in du Pont.

3. The fact that the Proposed Judgment would require du Pont to maintain certain accounting procedures with respect to the General Motors take-down shares does not indicate that a trust would be created.

Paragraph (b) of Article VIII, as amended, indicates that there is to be no segregation of the take-down shares from other assets, but only such accounting procedures as will make it possible to determine whenever necessary the number of such shares on hand, and the net proceeds of any conversions or reconversions thereof on hand, together with the amount of net income realized therefrom less the amount of Common dividends charged thereto.

Whatever may be said of the accounting system devised to record the amount of General Motors take-down shares and to serve as a record of those who have been permitted to take down and those who have not, it cannot be viewed as creating a trust.

[fol. 1398] 4. The Sinking Fund Analogy to Accounting Segregation.

When a sinking fund for the retirement of bonds or the redemption of preferred stock is established, with a trustee under a trust agreement, the segregation of funds in such a trust does not vest any interest therein in a bondholder or stockholder. Insofar as sinking funds are concerned, Regulations 1.61-13 provides:

> "If a corporation, for the sole purpose of securing the payment of its bonds or other indebtedness, places property in trust or sets aside certain amounts in a

sinking fund under the control of a trustee who may be authorized to invest and reinvest such sums from time to time, the property or fund thus set aside by the corporation and held by the trustee is an asset of the corporation, and any gain arising therefrom is income of the corporation and shall be included in its gross income."

So the Treasury makes it clear that an intracompany segregation of property does not amount to a distribution nor application of the property for the benefit of a creditor, and what is in the fund remains corporate property. The fund, even though in the hands of a trustee, is still a corporate asset. The analogy is apparent. The same reasoning should be applied to a reservation of assets out of which dividends may be paid. No taxable event occurs by the [fol. 1399] reservation alone. The money or shares still remain the absolute property of du Pont, since no distribution has as yet been made.

5. Express Trust Situations Distinguished

In addition to *Rev. Rul. 54140*, 19-54-1 C. B. 116, discussed below, and the many similar cases where national banks have attempted to spin off their investment affiliates through the medium of a trust, there are other situations where dividends in the form of beneficial interests in a trust have been distributed.

For example, in *G. C. M. 916*, VI-1 C. B. 135 (1927), which involved an anti-trust divestiture by court decree, the M Company was ordered by the court to transfer all of the stock of its wholly owned subsidiary, the O Company, to third party voting trustees, under an express declaration of trust, in exchange for shares or certificates of beneficial interest in such trust (the number of units of interest in the trust was made equal to the number of outstanding shares of the M Company). The shares or certificates of beneficial interest in the trust were then offered to the stockholders of the M Company for a nominal price, and were so purchased by them. The court found that the stockholders [fol. 1400] had received a dividend when the unqualified right to purchase the trust certificates was offered to them by the M Corporation.

Also, in the case of *Henry L. Erlewine*, 19 B. T. A. 253 (1930), a corporation had a $50,000 claim against one of its dealers, was willing to accept the dealer's entire business (the gross assets of his dealership subject to all the liabilities of the dealership to others) in payment of such claims, but was unwilling to take assets. (Apparently the creditor corporation did not want to risk becoming personally liable to the dealer's other creditors, nor to become involved in the problems of qualifying to do business directly in the dealer's state). The creditor corporation could not, under applicable local law, own stock of other corporations. A plan was evolved whereby the dealer incorporated his business and transferred all the stock of the new corporation to himself as trustee under a trust agreement with the creditor corporation and all of its stockholders. The Board held that the agreement vested the beneficial interests in the trust in the stockholders and constituted the receipt by them of a dividend.

Cases such as the above are clearly distinguishable from the instant situation. In those cases, the assets originally held by the distributing corporation were removed from the [fol. 1401] corporation and were no longer subject to the control of the corporation or to the claims of its creditors. Also, the assets were expressly and intentionally transferred to a trust, and the beneficial interests in and the power of control over the assets were vested in the shareholders of the distributing corporation.

C. The authorities relied upon by Internal Revenue Service representatives do not support a "trust theory" in this case.

In support of the position taken at the conference on February 9 by certain of the representatives of the Chief Counsel to the Internal Revenue Service, reliance was placed on *Revenue Ruling 54-140*, C. B. 1954-1, 116, and the Treasury's rejection of *Earl R. Wilkinson, et ux.*, 29 T. C. 421 (No. 45) (1957). That Ruling apparently refers to the same facts involved in the *Wilkinson* case, wherein the Tax Court overturned the position taken in the Ruling. We understand that the position of the Treasury, however, remains as stated in the Ruling. The Tax Court's decision in *Wilkinson* is of course inconsistent with the position taken

at the conference. Moreover, it is submitted that the Revenue Ruling itself does not support that position, as discussed in detail below.

[fol. 1402] The Tax Court in the *Wilkinson* case relied on two basic concepts for holding that there had been no dividend distribution: first, that the stockholders held the same investment both before and after the transfer by the corporation to the trust, and, second, that after the transfer to the trust the stockholders still had a single, integrated investment, as nothing had been severed from the holdings represented by the bank stock by reason of the transfer in trust. It is apparent that the application of this reasoning to the instant case would lead to the conclusion that there would be no dividend distribution on the entry of the Judgment.

The factors relied on in *Revenue Ruling 54-140* for holding that there had been the creation of beneficial interests in a trust that were separate from the bank's assets, were: (1) the trustees and not the bank were considered to be the legal owners of the stock; (2) no action could have been taken by the trustees without the consent of the holders of a majority of the stock of the bank; and (3) the stock held by the trustees was free and clear of claims of bank creditors, depositors and third parties. This separation led the Commissioner to the conclusion that there had been a dividend distribution.

Compare the three factors mentioned above to the Proposed Judgment:

[fol. 1403] (1) The action required of du Pont under the Proposed Judgment would not effect a change of ownership of the General Motors shares, whereas change of ownership is clear in the case covered by the Revenue Ruling. The Proposed Judgment would not effect a transfer of title, either actually or constructively, of the take-down shares, which will remain the property of du Pont until taken down. Change of ownership is not intended, and cannot be said to have occurred by implication.

(2) Under the Proposed Judgment there would be created no beneficial interests in any particular property. The stockholders would have no power to control the disposition of the take-down shares, as was the case in the Revenue Ruling.

(3) Under the Proposed Judgment the General Motors take-down shares would remain subject to the claims of du Pont general creditors and preferred stockholders. This critical difference between the Judgment and the Ruling is alone sufficient to render the position taken in the Ruling inapplicable.

An analysis of the Revenue Ruling therefore leads to the conclusion, even apart from the fact that the *Wilkinson* case did not follow it, that it will not support a ruling to the effect that the du Pont stockholders would realize dividend income as a result of the entry of the Proposed [fol. 1404] Judgment by the Court. The Ruling recognized the necessity of a *severance* of property *from the corporation* before a dividend results, but it was concluded that the factors discussed above constituted severance. It would seem apparent that the Proposed Judgment presents a case infinitely stronger in favor of the absence of severance than did the Revenue Ruling or the *Wilkinson* case.

II. The stockholders of du Pont would not receive a distribution of property upon the entry of the Proposed Final Judgment.

Paragraph (d) of Article VIII provides that each holder of du Pont Common may make application to the Court for permission to receive a distribution of his pro rata portion of the General Motors take-down shares (or substituted assets) and any undistributed income therefrom. All parties to the anti-trust proceeding are to be advised of each application, and are to be given an opportunity to oppose it, or to urge that it be approved only upon the imposition of conditions with respect to the voting, sale, or other matters in respect of the General Motors shares. Upon the approval of an application, the stockholder must surrender his old Common stock certificates and submit a closing agreement covering the income tax effects of his take-down. He will then receive his take-down shares and certificates of Special Common stock.

[fol. 1405] A. The stockholders will, upon entry of the Judgment, have the same proportionate interest in the same du Pont assets which will be represented by the same securities.

It is submitted that the interest of a holder of Common would not be changed in such a way by the entry of the

Judgment or by the charter amendment as to result in the realization of income. His interest in General Motors dividends received by du Pont would be the same after the Judgment is entered (and before the take-down) as before, and would remain the same if the take-down plan were to be terminated (before he had been permitted to take down). The Judgment gives the holders of du Pont Common (other than those who would be enjoined) a pass-through voting right in both the General Motors take-down shares and in the reserved General Motors shares. The Judgment gives the Common holder a conditional right to receive a distribution of General Motors take-down shares. However, his interest in General Motors assets or income would never be increased, and would never be changed or severed from the du Pont Common except by take-down. The Special Common would have less equity than the Common, but the equity of the Common would never be increased.

[fol. 1406] B. Upon the entry of the Judgment, the common stockholders of du Pont will not have received anything that is transferable separately from the stockholders' entire interest in du Pont.

The entry of the Judgment will give the du Pont stockholders nothing they did not have before. They will continue to have a single investment until permitted to take-down by the District Court.

The stockholders of du Pont will not only own the same proportionate interest in the same assets of du Pont; their interest will also be represented by the same security. Thus, they will not be able to transfer any interest in the General Motors take-down shares separately from their entire interest in du Pont, and, conversely, they will not be able to transfer their interest in du Pont's other assets separately from their interest in the General Motors take-down shares. This lack of separability of the stockholders' investment is extremely important, for it shows that the stockholders of du Pont will hold precisely the same investment after the entry of the Judgment as they now hold. In *DeCoppet* v. *Helvering*, 108 F. 2d 787 (C. A. 2d, 1940), Judge

Learned Hand, in upholding the Commissioner's contention, pointed out the significance of lack of separability as follows:

> [fol. 1407] "The important matter is not what formal legal differences there were between the model adopted and the ordinary case of a corporate subsidiary; but whether the investment was single. It was if the investor could not have dealt with the parts separately; and these investors could not. When we speak of an investment, we do not think of the various ventures in which the company may be engaged, or of the various properties it may hold. We think of the unity which we must deal with as such, regardless of the particular legal paraphernalia in which it is clad."

In reality, all that is created is an accounting system whereby the relative positions of those who have been permitted to take down and those who have not can be properly maintained. But there will be no credits to the accounts of any particular stockholder until the time the Court approves take-down. And even if a credit were to be made to the account of a particular stockholder, a taxable event would not even then have occurred. See *Joseph H. Miller, et al.*, 26 T. C. 115 (1956).

We suggest that the Treasury must draw a consistent line somewhere in respect to the extent to which appropriations for stockholders are treated as a severance from the corporation sufficient to constitute a distribution. The Courts have drawn a line in such cases as *Wilkinson, supra*, and the cases cited in that opinion. The Courts would [fol. 1408] require an *actual* and *real* severance rather than a constructive one from the standpoint both of the corporation and the shareholder.

The Treasury holds in the sinking fund situations that there is no severance although there is a definite segregation, and concludes that the property segregated remains corporate property. It held in *Revenue Ruling 54-140*, that there was not only a segregation, but also a severance because the property was not, after the distribution to the trust, subject to claims of crediors, was not corporate property, and was subject only to the control of the stockholders as beneficiaries of the trust.

In the instant case there is no severance and no segregation. The General Motors shares are not required to be retained in a fund for the benefit of any special group, but rather for the benefit of the corporation itself. The reservation of the property is far less absolute even than in the sinking fund situation. Certainly the line of severance cannot be drawn to include this sort of intercompany accounting.

C. The Dividend Declaration Analogy

The law is clear that a stockholder receives no dividend income by reason of the declaration of a dividend. It has been held that a dividend is not includible in the gross income [fol. 1409] of a cash basis taxpayer until he receives it. *Avery* v. *Comm.*, 292 U. S. 210 (1934); and Reg. Sec. 1.301-1(b). In the case of accrual basis taxpayers, the courts have rejected the concept of an accrual date in advance of receipt of the dividend. *Tar Products Corp.* v. *Comm.*, 130 F. 2d 866 (CA 3rd, 1942), rev'g. *Falmouth Co.*, 45 BTA 1033 (1941); followed in the case of *American Light & Traction Co.*, 3 TC 1048 (1944), aff'd. 156 F 2d 398 (CA 7th, 1946).

If a stockholder disposes of his investment after the dividend is declared but before the dividend is actually payable, his gain is considered realized on the investment only, for until the time payment is due, the dividend remains locked into the corporation. See *Putnam's Estate* v. *Commissioner*, 324 U. S. 393 (1945), and Reg. sec. 1.61-9(c).

On the entry of the Proposed Judgment the stockholders will not be guaranteed the ultimate receipt of a dividend as is true in the normal case, for the right of take-down is deferred until the application to do so is approved by the Court. Where Court action is necessary before an amount actually declared as a dividend is deliverable to the stockholder, the realization of dividend income is deferred until the court action becomes final. *Lee McRitchie*, 27 T. C. 65 [fol. 1410] (1956). The right to a dividend here will be less certain than the "rights" acquired by a stockholder in the traditional dividend declaration case. It seems apparent that in the absence of an actual transfer of the

General Motors shares to an entity for the benefit of the du Pont stockholders effecting a severance of those shares from other du Pont assets, the dividend theory cannot be supported.

All that a Common stockholder will receive under the Judgment is the right to receive a dividend if the Court should approve his application to take down. At that time he will be paid a dividend. Prior to this time his interest in the General Motors shares is locked into his investment in du Pont, and the rendition of the Proposed Judgment alone does nothing to dislodge it.

In the normal case, the circumstance which must exist before taxable income results is the stockholder's retention of his investment until the dividend record date, and the discretion to do so is solely within the control of the stockholder. Under the Proposed Judgment, not only must certain events occur (the approval of an application for take-down), but the discretion to bring this about is not within the stockholder's sole control. What then is the tax situa- [fol. 1411] tion in respect to stockholders who are never permitted to take-down? Would they be taxed on something they are never permitted to receive? It seems apparent that upon the entry of the Proposed Judgment a taxable event will not occur, and any reasoning to the contrary is wholly inconsistent and in conflict with the established principles in respect to the time of realization of dividend income.

D. Consideration of Other Cases

It seems evident that the position taken at the conference is not supported by the case relied upon by the government in *Wilkinson, supra.* In all these cases, *Lonsdale,* 11 B. T. A. 659 (1928), Aff'd 32 F 2d 537 (CA 8th, 1929), Cert. Den. 280 U. S. 575; *Andrews,* 26 B. T. A. 642 (1932); *Hopkins,* 27 B. T. A. 1331 (1933); and *Twohy,* 34 B. T. A. 444 (1936) there was an actual dividend declaration, followed by an actual dividend distribution made to an entity separate and distinct from the distributing corporation for the direct benefit of the stockholders. The required severance manifestly exists in these cases.

[fol. 1412] E. The privilege of applying to the District Court for take-down is too contingent to be of any immediate value to the stockholders of du Pont.

The only privilege acquired by the holders of du Pont Common resulting from the entries of the judgment is one to apply to the District Court for take-down. This privilege clearly has no immediate value, for the "right" of any stockholder (if it can be called a "right") to receive General Motors shares pursuant to a take-down application is riddled with contingencies. In the first place, the "right" of any particular stockholder to take-down is conditional upon obtaining the District Court's approval. Thus each application must comply with the standards established by the court to meet the anti-trust and the economic needs of the case. The Court must be assured that take-downs will not affect the maintenance of an orderly market in General Motors stock, and that each stockholder making application is not of a class as to which take-down free from special conditions is not desirable from the anti-trust point of view. It cannot be assumed that any stockholder's application will be unconditionally approved, or approved at all. Moreover, the Court could, pursuant to the provisions of Article XIII of the Judgment, terminate the take-[fol. 1413] down program before any particular stockholder's application has been approved. These contingencies are real and substantial. Meanwhile, du Pont retains the right to dispose of the General Motors shares. The shares may be taken to satisfy the prior claims of creditors or preferred stocksolders.

Furthermore, even after a take-down application is approved, the right of the stockholder to receive General Motors take-down shares is conditional. The stockholder must still (1) execute an appropriate closing agreement* and (2) surrender his shares of Common (which represent an interest in all of du Pont's assets) for an equal number of shares of Special Common (which represent an interest in less than all of du Pont's assets). Because of this latter requirement, the stockholder's economic position may not be enchanced in any practical sense, and it would therefore

* This requirement has been added in the amended version of the Judgment. See Paragraph (d) of Article VIII.

seem anomalous to urge that the mere privilege of applying for take-down is a right which has any value.

[fol. 1414] Conclusion

It seems that the only authority suggested as support for the position taken at the conference is *Revenue Ruling 54-140*, discussed above. Yet every factor on which the Commissioner relied in that Ruling in support of his holding that there had been a severance of corporate property, and thus a dividend, is absent in the Proposed Judgment. It is submitted that the position suggested at the conference is without support in the law or in prior rulings. It is radically divergent from the clear principle established by the law in respect to time of the realization of dividend income.

It is submitted that it would create an unworkable, inconsistent and highly troublesome precedent for the Treasury to rule that the accounting required by the Proposed Judgment amounts to a severance of the General Motors shares from du Pont.

Accordingly, it is respectfully requested that a ruling be issued that under the Proposed Judgment the Common stockholders of du Pont would not realize dividend income at any time prior to the approval of applications for take-down by the Court.

Respectfully submitted, Andrew J. Dallstream, Amicus Curiae.

[fol. 1415] U. S. TREASURY DEPARTMENT

Internal Revenue Service
Washington 25, D. C.

In Reply Refer to
T:R:R-ES
July 8, 1959.

T:R:R
ES
E. I. du Pont de Nemours and Company,
Wilmington 98, Delaware

GENTLEMEN:

A letter dated September 25, 1958, requests a ruling as to the Federal tax consequences of effectuating the proposed judgment filed by Andrew J. Dallstream, amicus curiae, on August 7, 1958 in the United States District Court, Northern District of Illinois, Eastern Division in a case entitled United States of America, Plaintiff v. E. I. du Pont de Nemours and Company et al., Defendants, Civil Action No. 49 C 1071. The request was signed by E. I. du Pont de Nemours and Company (du Pont), Christiana Securities Company (Christiana), Delaware Realty & Investment Corporation (Delaware) and Andrew J. Dallstream and Manuel E. Cowen, amici curiae. A memorandum in support of the rulings requested, was submitted on October 20, 1958. An amended proposed judgment was submitted with a letter dated March 4, 1959. This amendment merely clarified certain provisions of the proposed judgment which was filed on August 7, 1958.

The various corporations involved in the above-mentioned court action, had outstanding on December 31, 1957, common stocks which were owned, so far as herein pertinent, as follows:

	Shares Outstanding	Owned by Du Pont	Christiana	Delaware
Du Pont	45,604,345	—	12,199,200	1,217,920
Christiana	150,000	—	—	49,000
General Motors	280,989,096	63,000,000	535,000	—
Delaware	785,000	—	—	—

The General Motors shares owned by du Pont have an aggregate adjusted income tax basis in the hands of du Pont of approximately $132,000,000. The present value of

these shares is approximately $2,800,000,000. The earned surplus of du Pont is about $1,100,000,000.

[fol. 1416] On June 3, 1957, the Supreme Court rendered its decision in United States v. E. du Pont de Nemours & Company, et al., 353 U.S. 596, the antitrust suit involving the four corporations named above, and remanded the case to the District Court for determination of the equitable relief necessary and appropriate in the circumstances. The Department of Justice filed its proposed final judgment on October 25, 1957. On May 9, 1958 the Internal Revenue Service issued a ruling as to the tax consequences of this proposed judgment. Andrew J. Dallstream, amicus curiae, filed a proposed judgment on August 7, 1958. On August 8, 1958 United States District Judge Julius H. Miner ordered du Pont and amicus Andrew J. Dallstream to request a ruling from the Internal Revenue Service as to the income tax consequences of effectuating the proposed judgment. All other parties and amicus Manuel E. Cowen were directed to cooperate in the preparation and prosecution of the request. The pertinent facts contained in the proposed judgment appear to be as follows:

Du Pont, Christiana, Delaware and certain individuals connected with these corporations, would be prohibited from exercising voting rights on General Motors stock owned directly or indirectly by them. All voting rights otherwise exercisable by the three corporations would be passed through to their respective shareholders in a manner specified in the proposed judgment.

Du Pont, Christiana and Delaware would be prohibited from acquiring any additional shares of General Motors stock except as stock dividends or as distributions with respect to or in exchange for stock of du Pont or Christiana; the exceptions include the distributions provided for in Article VIII of the proposed judgment. If du Pont, Christiana or Delaware receive any rights to buy General Motors stock, they may not exercise these rights but may either distribute them to their shareholders or sell them.

Article VIII of the proposed judgment contains the provisions for the disposition of the 63,000,000 shares of General Motors common stock now owned by du Pont.

Du Pont would be required to take the action necessary to authorize the creation of a new class of common stock herein

called "special common stock". With the exception of voting rights in certain special situations and with the exception hereinafter stated, the rights of the present common stock and the special common stock will be identical. [fol. 1417] The holders of the special common stock will not be entitled to any part of the allocated General Motors shares, hereinafter discussed, or the income therefrom but will be entitled to their pro rata share of all other du Pont income, and assets in case of liquidation or in case of a property dividend consisting of other than allocated General Motors shares, including General Motors shares not allocated.

It is proposed that du Pont be authorized to retain for general corporate purposes part of the 63,000,000 shares of General Motors stock, not in excess of a number to be specified by the Court; as stated above, du Pont would not be permitted to exercise voting rights on the retained shares. The balance of the 63,000,000 shares would be allocated for distribution to the holders of du Pont common stock. Du Pont would be required to keep separate accounts for the allocated shares. The separate accounts would reflect the segregation of the allocated shares and/or substituted assets and the separate income, expenses, taxes and other charges properly applicable thereto. "Substituted assets" means the proceeds from the sale or exchange of any of the allocated shares. The "separate income" will consist of all of du Pont's income from the allocated General Motors shares and/or substituted assets including the proceeds from the sale of any rights to buy General Motors stock, received with respect to the allocated shares.

Du Pont may not dispose of, other than by way of distribution to the holders of du Pont common stock, more than 5% of the then allocated General Motors shares and/or substituted assets except on the affirmative vote of the holders of at least two-thirds of the du Pont common stock outstanding. While the proceeds from the sale of any of the allocated shares will become substituted assets for the benefit of the holders of du Pont common stock, such proceeds will be subject to the legal rights or prior claims of creditors or holders of preferred stocks of du Pont. Du Pont may distribute, at any time, all or a part of the allocated shares and/or substituted assets to the holders of its common stock without their approval.

Any holder of du Pont common stock, including Christiana and Delaware, may make written application to du Pont for any part or all of his pro rata share of the allocated General Motors shares and/or substituted assets. Such applications will be submitted quarterly to the Court for approval. After approval by the Court, the applicant will surrender for cancellation his shares of du Pont common stock covered by the application (this may be all or a [fol. 1418] part of the shares owned by a particular shareholder) and will receive (1) one share of du Pont special common stock in exchange for each share of du Pont common stock surrendered and (2) the amount of allocated General Motors shares and/or substituted assets and undistributed income in the special account, allocable to the shares of du Pont common stock surrendered. At the option of du Pont, cash or scrip may be paid in lieu of any fraction of a General Motors share or other securities included among the substituted assets. There is no time limit for making the applications. Therefore, if none of the shareholders make application, du Pont will be permitted to keep all of the 63,000,000 shares.

It is stated that the details for handling the problems involved in making the above-discussed distributions have not yet been worked out. However, it is anticipated that the detailed provisions to be worked out will require that at some point, at or prior to the approval of a shareholder's application by the Court, each application would become irrevocable and binding on heirs, legal representatives and assigns of the applicant unless the Court proposes to impose conditions on the approval of the application, in which event the application may be withdrawn.

Du Pont will be authorized to sell or otherwise dispose of all the 63,000,000 shares of General Motors stock now held by it; provided, however, that each disposition must be approved by the Court and a sale of more than 5% of the allocated General Motors shares must also be authorized by vote of the holders of at least two-thirds of the shares of du Pont common stock outstanding.

A ruling is requested as to the tax consequences of the proposed distributions.

Based solely upon the facts as submitted and in the absence of other material facts or circumstances and upon

a literal construction of the terms of the proposed judgment, it is held as follows:

(1) The segregation of a portion of the shares of General Motors common stock and the keeping of separate accounts thereon by du Pont, will have no significance for Federal income tax purposes. Therefore, all income and expenses with respect to the 63,000,000 shares of General Motors common stock owned by du Pont, will be treated as though there had been no segregation of the General Motors shares.

[fol. 1419] (2) The recapitalization of du Pont will be considered a reorganization under section 368(a)(1)(E) of the Internal Revenue Code of 1954. No gain or loss will be recognized to du Pont as a result of this recapitalization.

(3) Under section 356(a), gain, if any, will be recognized to the holders of du Pont common stock upon the exchange of one share of du Pont common stock for one share of du Pont special common stock, General Motors common stock and, perhaps, cash and other property. The recognized gain will be limited to the sum of the cash and the fair market value, on the distribution date, of all other property, including the General Motors common stock and/or any fractional interest therein. The gain recognized will be treated as a dividend to the extent of each shareholder's ratable share of du Pont's earnings and profits; the remainder of the recognized gain will be treated as gain from the sale or exchange of property. No losses will be recognized on the exchange (section 356(c)).

(4) In determining the amount of the gain of any shareholder, either corporate or noncorporate, upon the exchange described in ruling (3), all property distributed, other than cash, will be included in the computation at its fair market value on the date of its distribution to a particular shareholder (section 1.356-1(d) of the regulations on the 1954 Code).

(5) The basis of the du Pont special common stock will be the same as the basis of the du Pont common stock exchanged therefor, decreased by the sum of the cash and the fair market value of the other property received, and increased by the gain recognized, both as a dividend and as gain from the sale or exchange of property (section 358(a)(1)).

The basis of the property received in the exchange (other than cash), including the General Motors common stock or a fractional interest therein, will be its fair market value on the distribution date (section 358(a)(2)).

[fol. 1420] (6) The holding period of the du Pont special common stock will include the period a shareholder held the du Pont common stock exchanged therefor (section 1223(1)).

The holding period of the General Motors common stock and/or any fractional interest therein and of any other property received in the exchange (except cash), will begin with and include the day following the date of receipt of such stock and other property. (E. T. Weir, 10 TC 996, affd. 173 Fed. (2d) 222.) Also see I.T. 3985, 1949-2 CB 51, relative to computation of the holding period. This ruling also applies to a whole share of General Motors common stock acquired in part by the purchase of additional fractional interests.

(7) The fractional share of General Motors stock (or a fractional interest in any other property) to which any shareholder of du Pont will be entitled, will be considered to have been distributed to the shareholder along with the whole shares and to have been sold by the shareholder. Therefore, gain or loss will be recognized under section 1002, to a shareholder upon the sale of a fractional share of General Motors stock (or fractional interest in any other property). Such gain or loss will be measured by the difference between the basis of the fractional share on the date of its distribution and the amount of cash received from the sale thereof. The gain or loss will be capital gain or loss provided that the General Motors stock (or other property) is a capital aset in the hands of the particular shareholder making the sale. (Sections 1201-1222 inclusive.)

(8) The effective date of the exchange for all Federal tax purposes, as to each shareholder, will be the date of the distribution to such shareholder of the du Pont special common stock and other property, including the General Motors common stock. (Paul L. Case, 103 Fed. (2d) 283; Sidney F. Tyler, Trustee, 72 Fed. (2d) 950; Edgar Stanton, Executor, 34 BTA 451, affd., 98 Fed. (2d) 739, cert. denied, 305 U.S. 650).

[fol. 1421] (9) For all Federal income tax purposes there will be included in the taxable income and earnings and

profits of a corporate share holder of du Pont, as a result of the transaction described in ruling paragraph (3), only the amount of the gain recognized under section 356(a).

(10) The earnings and profits of du Pont (to the extent thereof) will be decreased each year by the sum of (a) any cash and the adjusted basis of any property distributed in a particular year as a distribution to which section 301 is applicable and (b) any cash and the adjusted basis of the General Motors common stock or other property distributed in that year in connection with the recapitalization, to the extent that the distributions are taxable under section 356(a). (Section 312(a)).

Distributions of rights to buy General Motors stock will be considered distributions under section 301 except as stated in ruling paragraph (13).

(11) All distributions made by du Pont, regardless of the source of the distribution, to the holders of its common stock other than in connection with the recapitalization, will be treated as dividends under section 301(c)(1) to the extent of du Pont's earnings and profits as defined in section 316 and will be taxable to the shareholders when received.

(12) If the amount of all distributions, determined under sections 301(b)(1) and 356(a), made by du Pont in a specific taxable year, exceeds du Pont's earnings and profits, it will necessary for du Pont to determine the total amount (cash, General Motors shares and any other property) distributed during the year. The total amount distributed during the year will be the sum of (a) the cash and the fair market value or adjusted basis, as the case might be, of other prop- [fol. 1422] erty distributed as a distribution to which section 301 is applicable and (b) the total of the gains recognized to all shareholders under section 356(a). The amount that will be treated as a dividend under sections 301(a)(1) and 356(a)(2), will be the ratio of the earnings and profits of du Pont to the total amount of the distributions made by du Pont during the taxable year. The ratio so determined will be applied (a) to the total amounts distributed under section 301 during the taxable year to each shareholder of du Pont, whether corporate or noncorporate, and (b) to the gain recognized to each shareholder under section 356(a), to ascertain the amounts that will be treated as dividends to each distributee.

(13) Distributions by du Pont, Christiana or Delaware of rights to buy General Motors stock will be distributions under section 301 unless such rights are distributed by du Pont as part of the distribution to which section 356 is applicable. Sections 307 and 1223(5) have no application to rights to buy stock of a corporation other than the one which distributes the rights. The holding period of these rights to buy General Motors stock will begin with and include the day following the date such rights are received by the shareholders of du Pont, Christiana or Delaware. (E. T. Weir, 10 T.C. 996, aff'd. 173 Fed. (2d) 222.).

Gain or loss will be recognized to du Pont, Christiana and Delaware upon the sale of rights to buy General Motors stock measured by the difference between the basis of the rights and the selling price thereof. Such gain or loss will be subject to the provisions and limitations of Subchapter P, Chapter 1 of the 1954 Code. The basis of the rights received by dn Pont and Christiana as shareholders of General Motors will be determined under section 307. The basis of the rights received by Christiana as a shareholder [fol. 1423] of du Pont and by Delaware as a shareholder of du Pont and Christiana will be determined under section 301(d)(2). The holding period of rights received by du Pont and Christiana as shareholders of General Motors, will include the period these corporations have held their General Motors stock (section 1223(3)).

(14) The amounts treated as dividends in ruling paragraph (3) will not be eligible for the credit, exemption and deduction provided by sections 34, 116 and 243. The reason for so holding is that both the amount that is to be taxed and the manner in which such amount is to be treated, are determined under section 356(a). Therefore, sections 316 and 301 are not applicable to distributions under section 356(a). See sections 1.34-3 and 1.243-1 of the regulations on the 1954 Code.

(15) No advance ruling may be issued as to the tax consequence to du Pont of a disposition of General Motors stock between the date on which General Motors declares a dividend and the date such dividend is paid, since a determination of the taxpayer to whom the distribution is taxable depends upon the facts and circumstances in each individual case. See Clarence W. Miller, et al., 247 Fed. (2d) 206.

(16) The designation or allocation of a given number of General Motors shares by du Pont for stated and particular purposes will not incur documentary stamp tax if the procedure does not involve an actual transfer by du Pont to others of the shares so designated or allocated.

If the issuance of a share of du Pont special common stock is against the same capital as was the share of common stock surrendered therefor, no issue tax will be due. In other words, the mere exchange of one share of common for one share of special common (plus General Motors stock and possibly cash and other property) will not incur an original issue tax under section 4301 if the exchange is made without an increase in du Pont's capital stock account. If [fol. 1424] any du Pont special common stock is sold for a consideration, or issued otherwise than in an exchange referred to in the preceding paragraph, an original issue tax will be due. No stock transfer tax liabilities will attach upon the surrender for cancellation and extinguishment of shares of du Pont common stock pursuant to applications approved by the Court.

Stock transfer tax at the minimum rate of 5 cents will apply on the distribution of General Motors stock to the shareholders of du Pont. The issue of scrip representing a fractional share of General Motors stock is not subject to the documentary stamp tax. The transfer of scrip for less than a full share of General Motors stock is not subject to the transfer tax. However, the transfer of scrip on a single bill of sale for one or more full shares of stock is taxable, the tax to be based on the full shares only. The surrender of scrip for cash or for full shares of General Motors stock is not taxable for the reason that such surrender is for the purpose of cancellation and extinguishment.

The transfer of whole shares of General Motors stock to holders of scrip upon surrender of such scrip therefor, is subject to the stock transfer tax at the minimum rate of 5 cents. The transfer of General Motors stock by du Pont to its shareholders in a common stock for special common stock exchange transaction is, of course, also subject to the transfer tax. If any of the General Motors shares retained by du Pont for general corporation purposes is sold, a tax will likewise be incurred on such sales.

Section VI of the proposed judgment refers to the possible receipt by du Pont, Christiana or Delaware of rights

to purchase General Motors stock. These companies are enjoined from exercising any such rights but they may in their discretion distribute in whole or in part or sell in whole or in part such rights received by it. It is assumed [fol. 1425] that this provision relates to the right to subscribe for unissued stock of General Motors. The issue of a warrant or right entitling the holder to subscribe for stock is not subject to tax, but the issue of stock upon exercise of the warrant is subject to the tax as imposed by section 4301. Section 4321 imposes a tax on the sale or transfer of rights to subscribe for shares or certificates of stock. Hence, the transfers of warrants or rights entitling the holder to subscribe for stock are taxable as transfers of rights to subscribe. (See section 113.36 of Regulations 71.)

Pursuant to the Excise Tax Technical Changes Act of 1958, the rate of tax on the transfer of par value or no par value stock (or rights thereto) will, effective January 1, 1959, be 4 cents on each $100.00 (or major fraction thereof) of the actual value of the certificates transferred (or the shares where no certificates are sold or transferred). However, a tax with respect to any sale or transfer shall not exceed 8 cents on each share, or be less than 4 cents on the sale or transfer.

It will be necessary (1) that page 2 of both the original and amended proposed judgments be modified to include the above rulings rather than the conclusions as to the Federal income tax consequences as now contained therein and (2) that there be deleted from Article VIII(d) of the amended proposed judgment the requirement to file Treasury Department Form 906.

Any change or modification of applicable statutes will render the rulings contained herein ineffective to the extent that they are dependent upon such statutes.

Very truly yours, (signed) Dana Latham, Commissioner.

[fol. 1426] DALLSTREAM, SCHIFF, HARDIN, WAITE & DORSCHEL
231 South La Salle Street
Chicago 4, Illinois

CEntral 6-4500
Cable Address
Dallschiff
August 12, 1959.

Hon. Dana Latham,
Commissioner of Internal Revenue,
Washington 25, D. C.

Your Symbol C

Re: Your letter dated July 8, 1959, addressed to E. I. du Pont de Nemours and Company, Wilmington 98, Delaware, signed by Dana Latham, Commissioner and bearing symbols T:R:R-ES

Dear Sir:

I received your letter dated July 8, 1959 on your Form 1155-M (Rev. 8-57), addressed to me at 231 South La Salle Street, Chicago 4, Illinois, bearing symbols T:R:R-ES, signed by Glen Paschall, Chief, Reorganization and Dividend Branch, and enclosing a copy of your letter ruling referred to above.

Your letter rules on the questions raised in the letter request dated September 25, 1958, signed by myself and others, with respect to the tax consequences of effectuating the proposed judgment filed by me as Amicus Curiae on August 7, 1958 in the United States District Court, Northern District of Illinois, Eastern Division, in the case entitled *United States of America, Plaintiff* v. *E. I. du Pont de Nemours and Company, et al., Defendants*, Civil Action No. 49-C-1071.

[fol. 1427] In ruling paragraph (2), at page 5 of your letter, you rule in effect that the exchange of one share of du Pont common stock for one share of du Pont special common stock is an exchange in substance, not merely an exchange in form without any effect in substance; and that such exchange will constitute a reorganization by way of a recapitalization of du Pont. In ruling paragraph (3), at page 5, you further rule in effect that the distribution of General Motors common stock by du Pont to the holders

of its common stock will not be in substance a transaction separate from the exchange of du Pont common stock in pursuance of the plan of reorganization for du Pont special common stock, but will be a part of such reorganization exchange. It is submitted that your ruling paragraph (3) renders nugatory the provisions of Regulation § 1.301-1(1), for if subdivision (1) of the regulation does not apply in this situation where else could it apply? The effect of your ruling (3) would be to encourage a corporation, which proposed to make a distribution of other property to a stockholder with a high basis for his stock, to cast the transaction in the form of a recapitulation, so that the boot would escape tax under the limitation of section 356(a)(1).

It is respectfully requested that you reconsider and reverse the position taken in ruling paragraph (3).

In ruling paragraph (14), on page 9 of your letter, you state as follows:

> "(14) The amounts treated as dividends in ruling paragraph (3) will not be eligible for the credit, exemption and deduction provided by sections 34, 116 and 243. The reason for so holding is that both the amount that is to be taxed and the manner in which such amount is to be treated, are determined under section 356(a). Therefore, sections 316 and 301 are not applicable to distributions under section 356(a). See sections 1.34-3 and 1.243-1 of the regulations on the 1954 Code."

It is respectfully requested that you also reconsider and reverse the position taken in ruling paragraph (14) for the reasons hereinafter stated.

Your rulings in ruling paragraphs (2), (3) and (14) are contra to those sought in the original ruling request; [fol. 1428] see my letter of October 20, 1958, requested rulings (3) and (4), at page 4, and Part II of the Memorandum of Authorities contained therein, at pages 28 through 34; and since under the rulings requested, the point raised in your ruling paragraph (14) could not have arisen, this point was not discussed in the memoranda filed with you. Therefore, the following discussion of our request for reconsideration of ruling paragraph (14) represents our first presentation on the question raised therein.

Summary of Related Portions of Ruling Letter

1. In ruling paragraph (2), at page 5, you rule that the issuance of new du Pont special common stock in exchange for old du Pont common stock will constitute a reorganization by way of a recapitalization under section 368(a)(1) (E) of the Internal Revenue Code of 1954.

2. You have, in paragraph (3), at page 5, of the ruling letter of July 8, 1959, ruled to the effect that the General Motors common stock will be received from a corporation a part to a reorganization (du Pont), in pursuance of the plan of reorganization (the recapitalization of du Pont), and (together with new du Pont Special common stock) in exchange for stock in such corporation (old du Pont Common stock), that the General Motors common stock is "other property" within the meaning of section 356(a)(1); and that the inclusion of such other property in the exchange *has the effect of the distribution of a dividend* within the meaning of section 356(a)(2). Consequently, you rule that gain realized by a du Pont stockholder upon such an exchange shall be recognized, but in an amount not in excess of the fair market value of such "other property", pursuant to section 356(a)(1), and that there shall be *treated as a dividend* to the distributee such an amount of the gain recognized under 356(a)(1) as is not in excess of his ratable share of the undistributed earnings and profits of du Pont accumulated after February 28, 1913.

3. You rule in paragraph (4), at page 5, that in determining the amount of the gain of any shareholder, either corporate or non-corporate, upon the exchange described in ruling (3), General Motors common stock will be included in the computation at its fair market value on the date of distribution, in accordance with Regulations § 1.356-1(d).

4. You have ruled in paragraph (5), at page 5, that the basis of the du Pont special common stock will be the same as the basis of the du Pont common stock exchanged there for [358(a)(1)], decreased by the fair market value of the [fol. 1429] General Motors common stock received [358(a)(1)(A)(i)], and increased by the gain recognized, both *as a dividend* [358(a)(1)(B)(i)] and as gain from the sale or exchange of property [358(a)(1)(B)(ii)].

5. In ruling paragraph 6), page 6, you rule that the holding period of the General Motors common stock will

begin with and include the day following the date of receipt of such stock.

6. In ruling paragraph (9), page 7, you rule that for all Federal income tax purposes there will be included in the taxable income and also in the earnings and profits of a corporate shareholder of du Pont as a result of the receipt of a share of General Motors common stock in a transaction described in ruling paragraph (3) only the amount of gain recognized under section 356(a).

7. You have ruled in paragraph (10), at page 7, that the earnings and profits of du Pont will be decreased each year *by the adjusted basis* of the General Motors common stock distributed in that year in connection with the recapitalization, to the extent that the distributions thereof are taxable under section 356(a), in accordance with section 312(a)(3) of the Code.

Argument

By way of introduction, it should be stated that the taxpayers in this instance do not concede the validity of the position taken in the regulations under section 356(a) and in the ruling letter to the effect that the provisions of sections 301(b)(1)(B) and 301(d)(2) are inapplicable to "boot" dividends received by a corporate stockholder. However, for purposes of this request, and in all of the following discussion, the position taken in the Regulations in this respect is not discussed.

I. Analysis of Relevant Provisions of The Statute

Even if the *amount* to be taxed is determined under section 356(a)(1); the determination of whether the receipt of all (or any part) of such amount has *the effect of the distribution of a dividend* is made under section 356(a)(2); and the amount so determined to be taxable and to have the effect of the distribution of a dividend is to be *treated as a dividend* to the extent that it is out of the earnings and profits of the distributing corporation, pursuant to section 356(a)(2); it is a complete nonsequitur to say that the amount which is to be treated as a dividend under section [fol. 1430] 356(a) is not a dividend for purposes of sections 316 and 301, and therefore, not a dividend for purposes of sections 34, 116 and 243. The ruling is inconsistent with all prior authority, and makes the language of the statute completely meaningless.

Statement

1. Section 34 allows to individuals, as a credit against their income tax, subject to certain limitations and exceptions, an amount equal to 4% of the *dividends which are received* from domestic corporations and which are included in gross income. Section 116 excludes, subject to certain exceptions, from the gross income of individuals the first $50 per annum *received as dividends* from domestic corporations. Section 243 allows corporations a deduction, subject to certain limitations and exceptions, in an amount equal to 85% of the *amount received as dividends* from domestic corporations which are subject to tax. These sections are by their terms applicable to amounts *received as dividends*.

2. Section 301(a) states:

"Sec. 301. Distributions of Property.

"(a) *In General*—Except as otherwise provided in this chapter, a distribution of property (as defined in section 317(a)) made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in subsection (c)."

and section 317(a) states:

"Sec. 317. Other Definitions.

"(a) *Property.*—For purposes of this part, the term 'property' means money, securities, and any other property; except that such term does not include stock in the corporation making the distribution (or rights to acquire such stock)."

3. Section 301(c)(1) states:

[fol. 1431] "Sec. 301. Distributions of Property.

"(c) *Amount Taxable.*—In the case of a distribution to which subsection (a) applies—

"(1) *Amount Constituting Dividend.*—That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income."

and section 316(a) states:

"Sec. 316. Dividend Defined.

"(a) *General Rule.*—For purposes of this subtitle, the term 'dividend' means any distribution of property made by a corporation to its shareholders—

"(1) out of its earnings and profits accumulated after February 28, 1913, or

"(2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year with diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

Except as otherwise provided in this subtitle, every distribution is made out of earnings and profits to the extent thereof, and from the most recently accumulated earnings and profits. To the extent that any distribution is, under any provision of this subchapter, treated as a distribution of property to which section 301 applies, such distribution shall be treated as a distribution of property for purposes of this subsection."

The definitions of "property" contained in sections 317(a) and of "dividend" contained in section 316(a) are broad and all inclusive; and the latter definition, which applies to *any* distribution of property made by a corporation to [fol. 1432] its shareholders out of earnings and profits, clearly encompasses those amounts which are to be *treated as a dividend* out of earnings and profits under 356(a)(2).

4. Sections 301(a) and 301(c), the operative sections of the Code, are equally broad, and also encompass 356(a)(2) dividend distributions within their terms. Section 301(a) commences with the language: "Except as otherwise provided in this chapter * * *". No exception applicable to section 356(a)(2) dividends appears in the Code.

II. The Treasury Regulations

1. Treasury Regulations Sections 1.356-1(b)(1) and 1.356-1(d) provide as follows:

> "§ *1.356-1. Receipt of additional consideration in connection with an exchange.*
>
> • • • • • • •
>
> "(b) If the distribution of such other property or money by or on behalf of a corporation has the effect of the distribution of a dividend, then there shall be chargeable to each distributee (either an individual or a corporation)—
>
> "(1) As a dividend, such an amount of the gain recognized as is not in excess of the distributee's ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913, and
>
> • • • • • • •
>
> "(d) Section 301(b)(1)(B) and section 301(d)(2) do not apply to a distribution of 'other property' to a corporate shareholder if such distribution is within the provisions of section 356."

Clearly, amounts "chargeable to each distributee (either an individual or a corporation) * * * as a dividend" are dividends for all purposes.

[fol. 1433] The Regulations state that sections 301(b)(1)(B) and 301(d)(2) do not apply to a distribution of "other property" to a corporate shareholder if such distribution is within the provisions of section 356. The regulations do not exclude the applicability of sections 301(a) or 301(c) to such distributions, nor do they exclude the provisions of section 301(b) or 301(d) other than the parts mentioned. Rather, by expressly excluding the application of only certain subdivisions of section 301 to section 356(a)(2) dividends, the Regulations indicate that all of the remaining provisions of section 301 are applicable thereto.

Regulations section 1.34-3(a), provide in part:

"§ *1.34-3. Dividends to which the credit and exclusion apply.*

"(a) *General rule.* The credit under section 34 and the exclusion under section 116 apply only to distributions of property defined as dividends by section 316. * * * The credit and the exclusion are allowed with respect to distributions from any organization taxed as a corporation if the distribution falls within the definition of a dividend in section 316."

Regulations section 1.243-1(a), provide in part:

"§ *1.243-1. Deduction for dividends received by corporations.*

"(a) * * * To determine the amount of the distribution to a recipient corporation and the amount of the dividend, see § 1.301-1 and § 1.316-1."

There is nothing in these references to sections 316 and 301 which would exclude their application to section 356 (a)(2) dividends.

The regulations under section 301, Regulations section 1.301-1(a) provide as follows:

[fol. 1434] "§ *1.301-1. Rules applicable with respect to distributions of money and other property.*

"(a) *General.* Section 301 provides the general rule for treatment of distributions on or after June 22, 1954, of property by a corporation to a shareholder with respect to its stock. The term 'property' is defined in section 317(a). Such distributions, except as otherwise provided in this chapter, shall be treated as provided in section 301(c). Under section 301(c), distributions may be included in gross income, applied against and reduce the adjusted basis of the stock, treated as gain from the sale or exchange of property, or (in the case of certain distributions out of increase in value accrued before March 1, 1913) may be exempt from tax. The amount of the distributions to which section 301 applies is determined in accordance with the provisions

of section 301(b). The basis of property received in a distribution to which section 301 applies is determined in accordance with the provisions of section 301(d). Accordingly, except as otherwise provided in this chapter, a distribution on or after June 22, 1954, of property by a corporation to a shareholder with respect to its stock shall be included in gross income to the extent the amount distributed is considered a dividend under section 316. For examples of distributions treated otherwise, see sections 116, 301(c)(2), 301(c)(3)(B), 301(e), 302(b), 303, and 305. See also Part II (relating to distributions in partial or complete liquidation), Part III (relating to corporate organizations and reorganizations), and Part IV (relating to insolvency reorganizations) of this subchapter."

The regulations under section 316, Regulations section 1.316-1(a)(1) and (2), and 1.316-1(c), provide as follows:

"§ *1.316-1. Dividends.*.

"(a)(1) The term 'dividend' for the purpose of subtitle A (except when used in section 803(e), section 821(a)(2), section 823(2), and section 832(c)(11) where the reference is to dividends of insurance companies [fol. 1435] paid to policyholders) comprises any distribution of property as defined in section 317 in the ordinary course of business, even though extraordinary in amount, made by a domestic or foreign corporation to its shareholders out of either—

"(i) Earnings and profits accumulated since February 28, 1913, or

"(ii) Earnings and profits of the taxable year computed without regard to the amount of the earnings and profits (whether of such year or accumulated since February 28, 1913) at the time the distribution was made.

"The earnings and profits of the taxable year shall be computed as of the close of such year, without diminution by reason of any distributions made during the taxable year. For the purpose of determining whether a distribution constitutes a dividend, it is unnecessary

to ascertain the amount of the earnings and profits accumulated since February 28, 1913, if the earnings and profits of the taxable year are equal to or in excess of the total amount of the distributions made within such year.

"(2) Where a corporation distributes property to its shareholders on or after June 22, 1954, the amount of the distribution which is a dividend to them may not exceed the earnings and profits of the distributing corporation.

• • • • • • •

"(c) Except as provided in section 316(b)(1), the term 'dividend' includes any distribution of property to shareholders to the extent made out of accumulated or current earnings and profits. See, however, section 331 (relating to distributions in complete or partial liquidation), section 301(e) (relating to distributions by personal service corporations), section 302(b) (relating to redemptions treated as amounts received from the sale or exchange of stock), and section 303 (relating [fol. 1436] to distributions in redemption of stock to pay death taxes). See also section 305(b) for certain distributions of stock or stock rights treated as distributions of stock or stock rights treated as distributions of property."

The regulations under section 317 merely paraphrase the statute.

As pointed out above under the heading "Summary of Related Portions of Ruling Letter", you have, after making the basic rulings in paragraphs (2), (3) and (4), ruled as follows:

(a) In paragraph (5), that the bases of new du Pont special common stock will be increased by the amount of gain recognized *as a dividend.*

(b) In paragraph (6), that the General Motors common stock will have a new holding period.

(c) In paragraph (10), that the earnings and profits of du Pont will be decreased by the adjusted bases of the General Motors shares distributed.

All of these rulings are wholly consistent with the treatment of the distribution *as a dividend* under all portions of section 301, other than 301(b)(1)(B) and 301(d)(2).

The statutory pattern, as indicated in the relevant portions of the statute which have been set forth herein, is to treat section 356(a)(2) dividends *as dividends* for *all* purposes. There is nothing in the references to sections 301 and 316 in the regulations under sections 34 and 243 to the contrary.

III. Precedents

Section 356(a)(2) of the Internal Revenue Code of 1954, is a re-enactment of section 112(c)(2) of the Internal Revenue Code of 1939, which in turn was a re-enactment of sections 112(c)(2) of the Revenue Acts of 1938, 1936, 1934, 1932 and 1928, and of sections 203(d)(2) of the Revenue Acts of 1926 and 1924.

[fol. 1437] Section 243 of the 1954 Code, which grants to corporations a deduction equal to 85% of the amount *received as dividends*, appeared in prior law, as follows:

Act	Section	% Deductible
1939 Code	26(b)	85%
1938	"	"
1936	"	"
1935	102(b)	90%
1934	23(p)	100%
1932	"	"
1928	"	"
1926	[illegible](a)(6)	"
1924	"	"

Sections 34 and 116 were new in the 1954 Code, but there was a somewhat comparable provision in prior acts [1924 and 1926 Acts, section 216(a)(1); 1928, 1932 and 1934 Acts, section 25(a)(1)] which excluded from the income of individuals, for normal tax purposes only, dividends received.

In the case of *Comm.* v. *Forhan Realty Corp.*, 75 F.2d 268, 35-1 USTC par. 9119, 15 AFTR 163 (CA 2d, Feb. 4, 1935); aff'g. BTA Memo. Op., Dkt. 60975, Jun. 16, 1933; P-H BTA Memo. Op. par. 33,331 [Vol. 2, page '33-403], the availability of the predecessor of section 243 to a corporate stockholder with respect to an amount *treated as a dividend* under the predecessor of section 56(a)(2) was litigated. In calendar year 1929, a corporation, Zonite Products Corporation, acquired all of the assets of another corporation, Forhan Company, for 175,000 shares of Zonite common stock and $5,250,000 in cash. As a part of the plan, the Forhan Company was dissolved and all of the Zonite stock, and

the cash, was distributed pro rata to all of the stockholders of the Forhan Company, including the taxpayer, Forhan Realty Corporation.

The Commissioner took the position that the taxpayer's gain realized on the liquidation of the Forhan Company, limited to the extent of the lesser amount of the cash received, was taxable as a liquidating dividend. The corporate stockholder, the taxpayer, argued that the distribution was part of a reorganization, that its gain, recognized only to the extent of the cash boot, was received in a distribution which had the effect of a dividend under [fol. 1438] section 112(c)(2) of the Rev. Act of 1928, and was taxable *as a dividend* [that is, in its case, subject to the 100% exclusion of section 23(p) of the Rev. Act of 1928] to the extent that it was out of earnings and profits. The Board of Tax Appeals held for the taxpayer. The Commissioner appealed to the Court of Appeals for the 2nd Circuit. The Court of Appeals affirmed. The following is quoted from the opinion of that Court:

> "* * * Congress did not limit the application of this new section, section 112(c)(2), to cases where the reorganization is carried out for the purpose of avoiding high surtaxes, nor to cases where the particular distributee would actually pay more taxes if the distribution be treated as a dividend. Com'r v. Owens (C. C. A.) 69 F.(2d) 597. The use of the word 'distribution' in section 112(c)(2) indicates that Congress was considering a fund which was to be distributed among the number of parties rather than a portion of that fund received by a particular distributee. The phrase requires a construction that the distribution is to be looked at from the viewpoint of the distributing corporation.
>
> "The petitioner argues that the section provides that the distribution be taxed as a dividend, which means necessarily that each portion of the distribution must be taxed in some way, and, if it is not actually taxed when treated as a dividend, it would be a contradiction of terms to say that it is intended that it should be 'taxed as a dividend.' But it is erroneous to say that the object of the section was to impose a tax in the case of each particular distributee. If the language

of the section is open to the fair construction that where certain distributions are not technically dividends but rather have the effect of dividends, they shall be treated as dividends for income tax purposes. The construction urged by the petitioner assumes wrongfully that the object of the section was to impose a tax in the case of each particular distributee. Fairly construing the section, it means only that certain distributions which are not technically dividends but have [fol. 1439] the effect of dividends shall be treated as such for income tax purposes.

"It is said that Congress intended that the first portion of the section should apply in the case of a particular stockholder only when his portion of the distribution would be subject to tax in his hands if it had been an ordinary dividend. 'Dividend' includes many distributions which are not taxable under the Revenue Act, such as dividends out of capital or earnings or profits accumulated before March 1, 1913. By this section Congress was dealing with dividends not technically known as such, but having the effect of dividends. Under such circumstances, it was correct to refer to 'taxable dividends' to distinguish them from other distributions which in common phrase are referred to as dividends, but which are nontaxable because of the source or form of their distribution.

"[2] At the time of the distribution in question, the undistributed earnings and profits were $10,490,000 and the respondent's ratable share must be computed on that basis. The statute makes no reference to the time at which such sum is to be computed, and, in the absence of some limitation, none should be presumed. The respondent's ratable share of the earnings and profits being in excess of the amount of gain recognized in section 112(c)(1) of the act (26 USCA § 2112(c)(1)), the entire amount of the gain should not be taxed as a gain from the exchange of the property, but should be included in gross income as a dividend. As a dividend it is not taxable. The decision must therefore be affirmed."

In the case of *John S. Woodard,* 30 BTA 1216, CCH Dec. 8640 (Jul. 20, 1934); Com.'s appeal to CA 3rd dis-

missed on April 23, 1935 without opinion, Allegheny Steel Co. had (in calendar year 1930) acquired all the assets of Lamination Stamping Co. for Allegheny common stock plus cash. As a part of the plan, Lamination was liquidated and distributed the Allegheny stock pro rata in exchange for the Lamination stock. Woodard, an individual stockholder, claimed that this was a reorganization with boot, that under section 112(c)(1) [356(a)(1)] his gain [fol. 1440] was recognized only to the extent of the cash received, that under section 112(c)(2) [356(a)(2)], the distribution had the effect of a dividend and must be treated as a dividend to the extent it was out of earnings and profits, and that consequently section 25(a)(1) [analogous to section 116 of the 1954 Code] should apply so as to exempt such dividend from the normal tax, so that taxpayer had to pay only surtax rates thereon. The BTA, in an opinion reviewed by the full Board, upheld the taxpayer's contention. The following is quoted from the opinion of the Board:

"• • • • • • •

"As before stated, the provisions of section 203(d)(2) were re-enacted in the 1926 Act under the same section number, and in the 1928 Act as section 112(c)(2). So far as concerns the question of taxing liquidating dividends, to the extent of accumulated earnings, as ordinary income, it is immaterial that the primary purpose of Congress in enacting section 203(d)(2) was to prevent the taxing of such distributions at the capital gain rate. The fact remains that Congress has provided that they 'shall be taxed as a dividend', subject to the full surtax rates, and not otherwise. We may not, therefore, read into the statute the requirement that accumulated earnings distributed as a liquidating dividend shall be taxed at the full surtax rates, and also, in addition thereto, at the normal tax rate.

"The conclusion herein reached is entirely in harmony with the settled and long continued general policy adopted by Congress for the taxation of corporate earnings. Section 25(a) of the 1928 Act provides that an amount received as dividends by an individual stock-

holder shall be subject only to the surtax, and section 23(p) provides that dividends received by a corporation shall be allowed as a deduction from gross income; that is, the amount is included in gross income and immediately deducted, so that it is not taxable to the corporate stockholder. It is then taxed at surtax rates when distributed to the individual stockholders. Similar provisions are contained in the prior acts. [fol. 1441] "These provisions unmistakably indicate the intention of Congress to subject corporate earnings to normal tax but once. The corporation which derives the earnings and profits is required to pay a normal tax thereon, and thereafter the stockholders pay only the surtax when distributed as dividends.

"Section 112 (c) (2), *supra*, consistently applies this same scheme of taxation to distributions in liquidation which embrace corporate earnings accumulated after February 28, 1913. Such distributions are not technically dividends for the reason that they are not recurrent, nor made in the ordinary course of business, but to the extent of the accumulated earnings it is apparent that they have 'the effect of the distribution of a taxable dividend,' and therefore must be taxed at the same rates as dividends, that is, at the full surtax rates only.

"In *George Woodward*, 23 B.T.A. 1259, we held that a distribution in liquidation which included surplus of the merged corporation accumulated after March 1, 1913, had 'the effect of a distribution of a taxable dividend under section 203 (d) (2) of the Revenue Act of 1926,' and was taxable as a dividend at surtax rates only, and not as capital gain.

"In *T. W. Henritze*, 28 B.T.A. 1173, 1176, we held that a liquidating dividend, to the extent of the accumulated surplus, must be taxed as a dividend under section 112 (c) (2), *supra*, and not as either ordinary income or capital gain.

"In J. T. Owens, 27 B.T.A. 469, we held that a distribution in liquidation, to the extent that it represented surplus and profits accumulated subsequent to March 1, 1913, was 'taxable as a dividend within the provisions of section 112 (c) (2) of the Revenue Act of 1928 • • • at surtax rates only.'

"The latest judicial expression on this question is contained in the opinion of the Circuit Court of Appeals for the Fifth Circuit, rendered March 17, 1934, in *Commissioner* v. *Owens*, 69 Fed. (2d) 597, affirming 27 B.T.A. 496, *supra*, as follows:

[fol. 1442] "The Board of Tax Appeals held that there was an exchange of stock for stock and money within the meaning of §112 (c) (1) of the Revenue Act of 1928, so that so much of the cash received as represents the surplus of the North Texas Bank is to be treated as a dividend not subject to normal tax while the remainder is fully taxable gain realized in the transaction. The Commissioner contends that all is gain.

"The Board is right. * * * The cash which they (stockholders of the liquidating corporation) received was all gain from their investment taxable under § 112 (c) (1), but so much of it as might before consolidating have been declared by their corporation as an ordinary dividend out of its profit is by (c) (2) to be so taxed. It is true that the money was not distributed by the North Texas Bank, and thus was not literally a dividend of that bank. But the statute speaks of a distribution which 'has the effect of the distribution of a dividend.' This pro rata payment to all stockholders of the North Texas Bank, whether assenting or dissenting, certainly has that effect.

"It may be noted in this connection that the respondent's regulations are in harmony with the foregoing construction of the statutes (see art. 575, Regulations 74, Revenue Act of 1928), and, as we understand, his contentions in the present case are not contrary thereto.

"For the reasons indicated, and on authority of the decisions cited, we here hold that so much of the recognizable profit derived by the petitioners as represents their respective ratable shares of the undistributed earnings of the Lamination Co. accumulated after February 28, 1913, is taxable as a dividend at surtax rates only.

"Reviewed by the Board."

[fol. 1443] The Commissioner originally published notice of Non-Acquiescence with respect to the dividend issue in this case, XIII-2 C. B. 38 (1934). Recently, he withdrew

this notice of Non-Acquiescence and published notice of Acquiescence, 1956-1 C. B. 6.

In the case of *Hazelton Corporation*, 36 B. T. A. 908 (Nov. 23, 1937), CCH Dec. 9813, which was also reviewed by the full Board, the Board again held that a corporate stockholder was entitled to the benefit of section 23(p)(1) of the Revenue Act of 1928 with respect to a boot distribution in a reorganization treated as a dividend under section 112 (c)(2). The opinion states:

* * * * *

"Under the plan of reorganization the Delaware corporation was to distribute all of its assets to its stockholders. In pursuance of that plan it declared a dividend on May 17 of $64.96 per share payable to its stockholders of record on June 1. After such distribution it had only a small amount of cash on hand. It also, pursuant to the plan of reorganization, distributed its remaining cash and turned over to its stockholders all of the shares of stock of the Nevada corporation in exchange for the outstanding shares of its own stock.

"The petitioner is a foreign corporation. Under the reorganization provisions of the Revenue Act of 1928, a foreign corporation is not to be treated differently from a domestic corporation. The dividends paid by the Delaware corporation and received by the petitioner in the amounts of $611,825.76 on June 1, and $5,547.50 on June 6, 1928, were paid out of the accumulated earnings of the Delaware corporation. Such dividends constitute distributions which have the effect of taxable dividends received by it under section 112(c)(2). Being dividends, they are deductible from the gross income of the petitioner under section 23(p) of the taxing statute.

"The respondent objects to this conclusion, contending that the dividends received by the petitioner from [fol. 1444] the Delaware corporation are not 'taxable dividends' within the meaning of section 112(c)(2). He takes the position that inasmuch as a corporation is entitled to deduct from gross income dividends received by it from domestic corporations it is not taxable upon them and hence that they do not constitute 'taxable' dividends to it.

"This argument of the respondent is directly opposed to *Commissioner* v. *Forhan Realty Corporation* (C. C. A., 2d Cir.), 75 Fed. 268; and *Rose* v. *Little Investment Co.* (C. C. A., 5th Cir.), 86 Fed. (2d) 50, which we think correctly construe the statute. In the last named case the court states:

> "* * * The phrase 'a taxable dividend' means only that the distribution is of profits and not of capital, and of profits accumulated since February 28, 1913 and thus in nature and in history subject to income tax. * * *

"To the same effect see *Commissioner* v. *Owens* (C. C. A., 5th Cir.), 69 Fed. (2d) 597; and *George Woodward*, 23 B. T. A. 1259.

* * * * *

"We think it is clear that it was the purpose of Congress to treat as taxable dividends to the recipients dividends paid by a liquidating corporation, a party to a reorganization, out of earnings which had been accumulated subsequent to February 28, 1913. Since the two dividends received by the petitioner on June 1 and June 6 in the amounts of $611,825.76 and $5,547.50, respectively, were taxable dividends to it, they constitute legal deductions from the gross income of the petitioner under section 23(p).

"The contentions of the petitioner with respect (1) to the dividends received by it from the Delaware corporation, and (2) to its claim that the gain realized by it from the exchange of shares of stock of the Delaware [fol. 1445] corporation for shares of stock of the Nevada corporation is not recognized for tax purposes under section 112(b)(3), are sustained.

* * * * *

The Commissioner appealed this decision to the Court of Appeals for the 9th Circuit, but his appeal was dismissed without opinion on February 20, 1939.

In the case of *Commissioner* v. *George O. Kolb*, 100 F.2d 920, 38-2 USTC par. 9616, 22 AFTR 358 (CA 9th, Nov. 30, 1938), Aff'g. BTA Memo. Op., Dkt. 78632, Feb. 26, 1937;

CCH Dec. 9604-G; 6 P-H BTA Memo. Decs., p. 37-50, par. 37,040, the taxpayer, Kolb, was a stockholder in General Baking Corporation (Maryland). This corporation was absorbed by General Baking Company (New York) in a reorganization exchange. Pursuant to the plan of reorganization, Kolb exchanged his stock in the Maryland Corporation for stock, securities and cash in the New York Company. Kolb treated the receipt of the new stock and securities as tax-free, and treated the cash as taxable to him as a dividend subject only to surtax. The Board of Tax Appeals found that there was a tax free reorganization, that pursuant to the Revenue Act of 1928, Section 112(c)(1), the gain realized on the reorganization exchange was recognized only to the extent of the cash received, that the receipt of the cash had the effect of a dividend under Section 112(c)(2), and that therefore (there being sufficient earnings and profits) was to be treated as a dividend subject only to the surtax and not to the normal tax. The Commissioner appealed to the Court of Appeals for the 9th Circuit. The Court of Appeals affirmed. The Commissioner did not petition for certiorari.

There is another "dividend relief" section in the Code, section 561(a)(1), implemented by section 562, which grants a deduction for the amount of dividends paid by a corporation during the taxable year for the purposes of the special income taxes on corporations improperly accumulating surplus [section 531(a)], on personal holding companies [section 545(a)], on United States shareholders of foreign personal holding companies [section 556(a)], and on regulated investment companies [section 852(b)(2)(D)]. A comparable provision was found in section 351(b)(2)(C) of the statutes applicable to the years 1934 and 1935, and in sec-
[fol. 1446] tion 27 of the statutes applicable to years 1936 through 1953. For the years 1936 and 1937, the deduction for dividends paid by a corporation was also available with respect to the surtax on undistributed profits imposed by section 14 of the Revenue Act of 1936.

In connection with recapitalization reorganizations of corporations, wherein the reorganized corporation has, in addition to issuing stock and/or securities which could be issued without recognition of gain or loss, also issued other property or money, and where the exchange of the "boot" has had the effect of the distribution of a dividend, and was

out of earnings and profits, the question has arisen as to whether the amount to be treated as a dividend was eligible for the dividends paid deduction. In the case of *The Hardman Tobacco Company*, 45 BTA 311, CCH Dec. 12, 108 (Oct. 8, 1941), Acq. 1943 C. B. 11, prior Non-Acq. 1942-1 C. B. 24 withdrawn, this issue was declined.

The taxpayer corporation engaged in a recapitalization reorganization whereby each share of its old first preferred stock together with dividend accumulations of $47.75 per share was exchanged for one share of new prior preference stock, one share of new preference stock, two shares of common stock and $4 in cash. The recapitalization reorganization was carried out in 1937 and the bulk of the cash was disbursed in 1937 with a small amount being disbursed in 1938. The taxpayer claimed a credit for dividends paid under Sections 27(a) and 27(h) of the Revenue Acts of 1936 and 1938 with respect to the cash payments. The Commissioner refused to allow a dividend paid credit. The Board of Tax Appeals held that the cash boot distributed in the recapitalization was to be treated as a dividend out of earnings and profits, and that consequently the taxpayer corporation must be allowed a dividend paid credit under Sections 27(a) and 27(h) even though some or all of the stockholders may have suffered losses on the exchange so that none of the cash boot was taxable to them.

The Commissioner published notice of Non-Acquiescence in this decision, 1942-1 C. B. 24, but subsequently published notice of his withdrawal of such Non-Acquiescence and of the substitution of his Acquiescence therein. 1943 C. B. 11.

See also the case of *Tobacco Products Export Corporation*, 21 TC 625, CCH Dec. 20, 130 (Jan. 29, 1954), Reviewed [fol. 1447] by the full Court. The following is quoted from the opinion of the Court:

> "Supplemental Findings of Fact and Opinion
>
> "The original opinion in this proceeding was promulgated on September 25, 1952. The second issue in the proceeding relating to dividends received credit was determined in favor of the respondent on the ground that the facts presented were insufficient to establish the petitioner's contention. A motion for further hearing was presented by the petitioner, which was granted

by the Court. Further evidence has now been admitted into the record. The only question in issue on the further hearing is whether the petitioner is entitled to a dividends received credit under section 26(b) of the Internal Revenue Code upon the sum received from the sale of Philip Morris & Co. Ltd., Inc., stock rights.

• • • • • • •

"Van Fossan, Judge: The issue in this proceeding is whether the petitioner is entitled to a dividends received credit under section 26(b), Internal Revenue Code, on the proceeds received from the sale by it of Philip Morris stock rights. As a common stockholder in Philip Morris, the petitioner received rights to subscribe to the preferred stock of that corporation. Petitioner sold the rights in 1946 for $12,685.23. The petitioner reported this amount for tax purposes as capital gain. The respondent determined that the proceeds of this sale were taxable as ordinary income. Petitioner does not contest this determination but disputes the respondent's refusal to grant the dividends received credit in that amount. • • •

• • • • • • •

"The respondent in G. C. M. 25063, *supra*, declares that stock rights are taxable as dividends when exercised. In the present instance he seeks to tax the [fol. 1448] sale of such rights as ordinary income but not as dividends. The decisions referred to above determine whether a taxable dividend arose upon the sale or exercise of such rights. The taxation of stock rights under these decisions is related to the taxation of stock dividends. We are of the opinion that the proceeds of the sale of the stock rights in the present case, concededly being taxable as ordinary income, constitute dividends for purposes of dividends received credit. No other issue relating to the stock rights has been presented and we decide none.

"The opinion promulgated on September 25, 1952, is accordingly modified.

"Reviewed by the Court."

Here again, the Commissioner contended that something which was admittedly taxable as ordinary income, and which was a dividend in a general sense, was not a dividend in a strict technical sense, and therefore was not subject to section 26(b) of the Internal Revenue Code of 1939. The full court ruled to the contrary, holding that the proceeds of the sale of the taxable stock rights were to be treated as a dividend, and were consequently subject to the dividend received credit.

Conclusion

It is submitted that the plain meaning of the words used in the statute requires that section 356(a)(2) dividends be treated as dividends for *all* purposes, including section 34, 116 and 243 purposes. There is nothing in the regulations to the contrary. The courts, in cases involving both individual and corporate taxpayers, have so held.

The ruling in ruling paragraph (14) is erroneous and should be reversed.

For the reasons set forth in my letter of October 20, 1958, and Part II of the Memorandum of Authorities contained therein, the ruling in ruling paragraph (3) is also erroneous and should be reversed.

Request for Hearing

It is requested that the taxpayers and the Amici Curiae in the du Pont case be granted a hearing with respect to [fol. 1449] this request at the earliest date convenient to your office. The representatives of the Antitrust Division of the Department of Justice, as interested parties in the du Pont antitrust litigation, would also, of course, be invited to be present at such hearing.

Very truly yours, Andrew J. Dallstream, Amicus Curiae.

[fol. 1450] September 23, 1959

T:R:R
ES
Mr. Andrew J. Dallstream,
c/o Dallstream, Schiff, Hardin,
Waite & Dorschel,
231 South LaSalle Street,
Chicago 4, Illinois.

Dear Mr. Dallstream:

Your letter dated August 12, 1959 requests reconsideration of our ruling dated July 8, 1959 relative to E. I. du Pont de Nemours and Company.

I am informed by my people that at the conference held in this office on September 11, 1959 there was a full discussion of the issues raised in your letter. At the close of the meeting our tentative conclusion was that we would have to sustain our ruling, and we so informed you with a full explanation of our reasons for arriving at this decision.

We have now concluded our futher consideration of the matters discussed at the conference, and for the reasons given at that time find that we must reaffirm the positions taken in our ruling letter of July 8, 1959.

Sincerely yours, Dana Latham, Commissioner

[fol. 1] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C-1071

United States of America, Plaintiff

vs.

E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, CHRISTIANA SECURITIES COMPANY, AND DELAWARE REALTY & INVESTMENT CORPORATION, Defendants.

Transcript of Proceedings of February 16, 1959

Transcript of Proceedings had in the above-entitled cause before the Honorable Walter J. LaBuy, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois, on Monday, February 16, 1959, at 10:30 o'clock a.m.

[fol. 2] APPEARANCES

Present: Mr. George D. Reycraft, Mr. Eugene Metzger, Mr. Bill G. Andrews, Mr. Edmund D. Ludlow, and Mr. Paul A. Owens, Antitrust Division, Washington, D. C., On behalf of the Government;

Sidley, Austin, Burgess & Smith, by Mr. George Ragland, Jr., 11 South LaSalle Street, Chicago 3, Illinois, and Covington & Burling, by Mr. Hugh B. Cox, Mr. John Lord O'Brian, Mr. Charles A. Horsky, Mr. Daniel M. Gribbon, and Mr. Alvin Friedman, 701 Union Trust Building, Washington 5, D.C. On behalf of the defendant, E. I. du Pont de Nemours and Company;

Mr. Charles A. Rittenhouse III, and Mr. Irving S. Shapiro, On behalf of the Legal Department, E. I. du Pont de Nemours and Company; and Mayer, Friedlich, Spiess, [fol. 3] Tierney, Brown & Platt, by Mr. Leo F. Tierney, Mr. Bryson P. Burnham, and Mr. Lee N. Abrams, 231 South LaSalle Street, Chicago 4, Ill., and Mr. Henry M. Hogan and Mr. Robert A. Nitschke, General Motors Bldg., Detroit 2, Michigan, On behalf of the defendant General Motors Corporation;

Kirkland, Ellis, Hodson, Chaffetz & Masters, by Mr. Howard Ellis, and Mr. Don H. Reuben, 130 East Randolph

Drive, Chicago 1, Ill., Dewey, Ballantine, Bushby, Palmer & Wood, by Mr. Wilkie Bushby, Mr. Phillip C. Scott, and Mr. Aram J. Kevorkian, 40 Wall Street, New York 5, New York, On behalf of the defendant, Christiana Securities Company and Delaware Realty & Investment Corporation; [fol. 4] Mr. Andrew J. Dallstream, Mr. Milton H. Cohen, and Mr. Burton R. Rissman, 231 South LaSalle Street, Chicago 4, Ill., Amicus Curiae with respect to the interest of the Stockholders of E. I. du Pont de Nemours & Co.; Mr. Manuel E. Cowen, and Mr. Francis M. Clamitz, Associate Counsel, One North LaSalle Street, Chicago 2, Ill., Amicus Curiae with respect to the interest of the Stockholders of General Motors Corporation.

[fol. 5] The Clerk: U. S. v. E. I. du Pont de Nemours, et al., case on trial.

OPENING OBSERVATION BY THE COURT

The Court: The Court would like to make a brief observation before this trial opens. The primary problem to be resolved through this trial is for the Court to promulgate a decree which will remedy the violation of Section 7 of the Clayton Act, without penalizing those who may become the innocent victims of this case, the stockholders and the beneficiaries in various trusts and institutions.

Equity and justice demand that the decree protect the interests of this group lest they become the casualties of this litigation, for under no reasonable theory can they be accused of violating any provision of the Antitrust Laws.

To redress a violation of law in this case is fairly simple, but to do it without punishing innocent people is the big problem here. During the delay of over thirty years before filing this lawsuit, the rights of over a million stockholders of these corporations have intervened, which greatly aggravates the Court's problem.

Now, if counsel on both sides will bear those thoughts in mind as we proceed with the evidence, you will greatly assist the Court.

Counsel may proceed.

Mr. Long: I am B. M. Long, Assistant Chief of the Midwest Office of the United States Antitrust Division.

The Court: I believe the court reporter would like to have all counsel state their appearances.

Mr. Long: I was going to introduce the counsel for the [fol. 6] Government and move their admission for the purposes of this case:

George D. Reycraft, a member of the District of Columbia Bar:

Paul A. Owens, a member of the New York Bar; Eugene Metzger, member of the New York Bar; Bill G. Andrews, member of the Utah Bar; and Edmund D. Ludlow, member of the District of Columbia Bar.

These counsel will handle the Government's case.

The Court: The motion is allowed.

STATEMENT OF MR. SCOTT IN SUPPORT OF MOTION OF CHRISTIANA AND DELAWARE TO BE STRICKEN FROM GOVERNMENT'S PLAN

Mr. Scott: May it please the Court, Mr. Reycraft has graciously consented that the issues involved in the motion of Christiana and Delaware should be argued at the outset of these hearings. I am, therefore, requesting, with the Court's permission, to address myself to those issues.

The Court: You may proceed.

Mr. Scott: I think at the outset some word of explanation is due the Court as to why these questions warrant present consideration.

The Government is asking sweeping and discriminatory relief against Christiana and Delaware, and certain other stockholders of the du Pont Company who are not even before this court.

We believe that the Government has established no right to ask this relief, and indeed is proposing to this Court that it exceed its authority. Because we believe this, we think it our duty to the Court and to the parties to make our position clear at the very outset of our deliberations.

[fol. 7] We have moved, on behalf of Christiana and Delaware, to strike from the Government's plan and remove from consideration those portions of the plan which would

subject them and the other stockholders mentioned to direct relief.

The primary provisions are those which would order the sale of all General Motors stock allocable to them as stockholders of the du Pont Company, some 18 million plus shares of General Motors, and, indeed, the sale by Christiana of its own privately held stock, which, incidentally was not even encompassed within the decision of the Supreme Court.

In addition, the Government would subject these stockholders to restrictive injunctive provisions as distinguished from all other stockholders of du Pont Company.

We agree that it is not necessary for this Court to decide these questions prior to and separate from its final determination. However, we do think it important that the Court and the parties have before them what we believe to be a fundamental problem in considering the various alternatives that will be debated during the course of the ensuing weeks.

The problem which our motion poses can be simply stated. The Court has before it two parties, Christiana and Delaware, each of whom was originally charged with violations of the antitrust laws. Those charges were thoroughly explored by this Court, findings entered, and the charges dismissed. The Government did not appeal from the dismissal of those charges.

Accordingly, these parties now stand before the Court, not only as parties not now accused of any violation of law, but as parties having been accused and found innocent. [fol. 8] Despite this, the Government is proposing that they be singled out among the large body of du Pont stockholders and be subjected to a sweeping decree, which would not only seriously restrict their legal rights, but would entail economic losses of a very severe order.

Again, I should repeat that this discriminatory relief is sought as well against certain other du Pont stockholders who are not even parties to this proceeding.

The Government's proposal, therefore, poses the question whether a Court has the authority to enter a decree against any person whether a party or not, who has not been charged and found guilty of a violation of law.

I suggest, your Honor, that any lawyer reared in our

traditions would be startled at the suggestion that the answer could be other than no.

However, as we understand it, the Government finally asserts the bald proposition that in an antitrust proceeding, given a finding of violation by one party, any party to that proceeding, whether not having been charged with a violation or whether having been charged and found innocent, may be subjected to a decree without its consent.

Stated more narrowly, as applied to the facts of our case, we understand the Government's position to be that where a corporation has been found guilty of violating Section 7 of the Clayton Act, stockholders of such corporation may be singled out and subjected to specific relief without their consent, even though they are innocent of any violation of the law.

I say the Government has finally asserted this proposition because it was not until its brief in connection with [fol. 9] this very motion that the Government undertook to meet this problem on its merits. We posed it in the Supreme Court, where the Government declined to argue the point, saying that the question was premature. We posed it again in our comments on the Government's finding. Again, the Government declined to argue the question on its merits, saying that the Supreme Court had decided the question.

I do not now intend to go into the demonstration that the Government is simply wrong in saying that the Supreme Court has already passed on this issue.

I think the Court will find the briefs adequate on this point.

I would like to say, however, that in asserting that the Supreme Court intended to pass on this question, a fundamental question involving constitutional issues, it was doing so without even adverting to it, and this despite the fact that it had been specifically raised and despite the fact that the Government did not advance a single argument in support of its position, something the Supreme Court has repeatedly said that it does not do.

Now, I prefer to come to grips with the merits of the issue itself.

First, I want to make very clear that we recognize the legitimate interest of the Government and the Court

in the nature of the stockholdings of the du Pont Company and, for that matter, of Christiana & Delaware. These questions are quite proper matters of inquiry in determining the type of relief to be entered against the du Pont Company. For that reason we have cooperated fully with the Government in exploring this question.

What we do assert is that we stand in no different [fol. 10] position than any other du Pont stockholder, so far as the right of the Government or this Court to single us out for discriminatory relief without our consent; and while we have every intention, your Honor, of cooperating to the end of meeting the reasonable objectives of the Government, we have no intention of consenting to a decree which is destructive of our interests and the interests of our stockholders, a decree which we regard as neither necessary nor fair.

We have taken our stand on this fundamental proposition of law: No plaintiff, including the Government of the United States, can become entitled to any relief against a defendant unless it has alleged and proven a cause of action justifying such relief.

The Government, as we understand it, does not question the general application of this principle of law. It asserts, however, that in antitrust cases, in certain situations at least, the principle does not apply. In antitrust cases, as distinguished from all other actions in equity, a party may be subjected to relief, they say, even though innocent itself of any violation of law.

Specifically, we understand their contention to be that where a corporation has been found guilty of violating the antitrust laws, the Government may select certain stockholders and demand that relief be directed against them, as well as the corporation, without alleging and proving any specific charges against them.

This is, indeed, I suggest, your Honor, a startling departure from our traditional concepts of justice. One would have thought, at the very least, that the Government would [fol. 11] have sought support in some provision of the antitrust laws themselves, or in some provision of the judicial code, but not one word has so far been adduced.

Instead, in its brief, the Government has relied solely upon the Aluminum case.

In connection with the Aluminum case, it makes this extraordinary statement, and I am quoting:

> "While the defendant has not been able to cite any cases in opposition to the proposition that parties against whom no cause of action has been proven may be proceeded against in relief hearings, the Government does have a case in support."

I think I can demonstrate to the satisfaction of this Court, first, that we have cited antitrust cases in which it has been held that parties may not be subjected to relief except upon the basis of proof of appropriate charges, just as in every other type of case; and, second, that the Court in the Aluminum case scrupulously adhered to the very principles for which we are here contending.

First, as to the Aluminum case—the Government asserts blandly that this case stands for the proposition that parties against whom no cause of action has been proven may be proceeded against in relief hearings, implying, of course, that this may be done against their will. In support of this, it asserts that in the Aluminum case, the common stockholders against whom relief was entered without their consent had not been found guilty of anything.

If, your Honor, this assertion were in fact correct, then indeed we would have to concede that the Government has a precedent for the power which they are here asserting; but the assertion is not correct.

[fol. 12] In the Aluminum case, decrees ordering disposal of stock or the surrender of voting rights were entered against two classes of individuals, namely, those who were defendants in the action, and those who had not been made defendants in the action. Those who were defendants in the action had previously been adjudged guilty of monopolization, along with the corporate defendants; and that there shall be no dispute on this point we have reprinted, as an appendix to our Reply Brief, excerpts from the judgment on mandate containing this adjudication.

The nondefendants, on the other hand, who had not been adjudged guilty of violation of the law, each and separately, executed a consent to the specific terms of the decree against them.

In passing, I may point out that some of these did not consent to a sale of their stock, but merely to a surrender of the voting rights.

How, I ask, can this case be cited in support of the proposition that parties against whom no charges have been proven can be proceeded against in relief hearings without their consent?

I suggest that the Court, in the Aluminum case, manifested the nicest of regard for the principles of equity for which we are here contending. It entered decrees against nondefendant persons only upon their specific consent to the decree if so entered.

And, again, that there may be no arguments on this score, we have appended to our Reply Brief the relevant portions of the judgment on stock disposal,

[fol. 13] If your Honor please, the sole contention of Christiana and Delaware is that they stand in precisely the same position as the nondefendants in the Aluminum case. Our consent, as was theirs, is necessary to the entry of any decree against us.

Now, as to the Government's contention that we have cited no antitrust case which holds that a Court may not enter a decree against parties as to whom no cause of action has been proven, I may say again in passing that even if the Government were to, this would obviously be no basis for asserting that antitrust actions, as distinguished from all other equitable actions, are exceptions to the general rule; but here, again, I assert, the Government is not correct.

In our main brief we cited the Hartford-Empire case, an antitrust case. In that case, certain individuals had been charged with participating in a conspiracy by participating in the acts of one of the corporate defendants.

During the course of the trial, this corporate defendant was dismissed from the case for failure of proof. It so happened that the individuals who had been charged with participating in the conspiracy, through the acts of the dismissed corporation, were also stockholders of Hartford, a corporation which had been found to be a party to the conspiracy charge. For this reason, the lower Court refused to dismiss the individual defendants and included them under the injunctive provisions of the decree.

On an appeal, the Supreme Court held that the lower Court had exceeded its authority in entering injunctive decrees against these individual defendants. The reason [fol. 14] was that they had only been charged with participation via the acts of the corporation, which itself had been dismissed; and mere proof of the fact that they were stockholders of a violating corporation could not support a decree as against them, absent allegation and proof that they had, in fact, individually participated in the violation of law.

This case, I suggest, is a square holding that a decree may not be entered against a party in an antitrust proceeding unless it has been alleged and proved that that party itself has violated the law.

We also cited the National Lead case, also an antitrust case.

In that case the companies involved were charged with violating the Sherman Act in certain patent pooling and related agreements, and the lower court so found. On appeal, the Government pressed for an order, requiring divestiture of certain of the plants of the violating companies. In a carefully reasoned opinion the Supreme Court rejected this proposal on the ground that there had been no allegation or proof that these plants had been acquired or used in violation of the Sherman Act, and that therefore it was beyond the authority of the Court to try to reach such plants by decree.

This case, I suggest, your Honor, is, if anything, even stronger precedent for the principle which we are here urging, for it means that even though a party has in fact violated the antitrust laws in certain respects, it is nonetheless beyond the authority of a court to enter a decree against them which goes beyond the particular respects in which they have been charged. It certainly follows that it is beyond the authority of a court to enter a decree against a party who has not even been charged with violation.

[fol. 15] In this connection, I would like to reemphasize that while the Government originally charged Christiana and Delaware with violations of the Sherman Act—and in that connection demanded relief against us—all such charges have been dismissed after a thorough and exhaustive trial by this court. They, therefore, are not only

parties not now charged, but parties having been charged and absolved.

I therefore submit, your Honor, that we have successfully met the challenge of the Government to cite antitrust cases which hold that antitrust cases are no exception to the general principles of equity which we here urge.

To summarize briefly, we are today urging upon the Court our position, because of our conviction that the Government has proposed relief against us which it has not established a right to against us, and which is beyond the authority of this Court to grant.

We think we have demonstrated the correctness of our position. However, we are not asking that our motion be decided in advance of the final determination of this Court. We are interested parties, and as such shall participate in these hearings, and, I repeat, are willing to cooperate with the Court to the end of achieving any legitimate objective of the Government consistent with fairness and equity.

Thank you.

STATEMENT BY MR. COX FOR DU PONT IN SUPPORT OF MOTION

Mr. Cox: May it please the Court, on behalf of the du Pont Company, I should like to call the Court's attention to the fact that we have filed a brief memorandum supporting the motion that Mr. Scott has just argued. I should particularly like to direct the Court's attention [fol. 16] to the observation we make in that memorandum with respect to the position of the stockholders of Delaware.

We point out that they are, on any view of the matter, if the Government's contention is to be considered, indispensable parties, and they would have to be joined, if any kind of relief is to be granted against them, because otherwise they are in position of persons who are not even before the Court, but whose property rights are threatened with impairment as a result of the Government's prayer for relief.

I particularly call your Honor's attention to that passage in the memorandum, and aside from that I should merely like to say that we support Mr. Scott's motion and believe that his argument is a sound and persuasive argument.

STATEMENT OF MR. METZGER FOR THE UNITED STATES IN OPPOSITION TO MOTION

Mr. Metzger: If it please the Court, the Government will make three basic points during this argument. The defendants Christiana & Delaware are effectively moving to dismiss as to themselves. This motion has been couched in terms of a motion to strike certain portions of the Government's proposed decree, but it effectually is a motion to dismiss as to themselves.

On such a motion the defendants have a burden of establishing their case. This burden they have not maintained.

The essence of the motion is that this Court does not have the power to move against them, and they have cited no authority for the particular proposition of power which they have advanced.

The second point is that even if they had established [fol. 17] some sort of prima facie case, this particular issue was decided by the Supreme Court when this very motion was raised before that body, when that Court stated, "It seems appropriate that they [Christiana & Delaware] be retained as parties pending determination by the District Court of the relief to be granted."

The third point Mr. Scott has somewhat alleviated by stating that he does not wish a decision on this motion until the conclusion of the case. But aside from the issue of power, the motion is premature in that the plaintiff intends to establish at this hearing the appropriateness of special relief as against the defendants Christiana & Delaware, and the stockholders of the last named company.

Turning to the defendants' briefs, the defendant first states in its reply brief that the Government alleges a special antitrust exemption to a requirement that a cause of action be proved. The Government has made no such allegation. The Government states that this is a general proposition of law—that relief may be had against a party named or represented regardless of whether that party has been found guilty of one of the proven causes of action.

The Government admits, of course, that a cause of action must be proved against one of the parties.

The defendants, in support of this contention, cite the Hartford Empire case. This was a patent pooling case

in which a number of companies had pooled their patents in the Hartford Empire Company. The relief against an action of this type is to find the conspirators guilty of conspiring to create a patent pool, and to divest whatever interest may be necessary to break up the violation—here, a patent pool as distinguished from the acquisition which is the essence of the violation in the instant case.

[fol. 18] In Hartford Empire the Court stated, and I quote from Page 2 of the Government's brief, "We think that the decree against these three individuals must be reversed for want of allegations in the Bill sufficient to support a decree against them, because the findings made do not support the decree as to them, because the refusal of findings requested by the Government exculpates them of participation in the conspiracy, and finally, because the proof fails to connect them with it."

Three individual defendants, officers of a dismissed corporation, were held by the trial Court to be retained as parties, because of an indeterminate minor stockholding in Hartford Empire. There was no ruling that Hartford Empire was to be broken up. The antitrust violation, the patent pooling operation, was to be effectively destroyed by injunctions against the parties to the violation, and these injunctions were had against those to whom it might apply.

The Court continues as to these parties, "Nowhere in the findings or in the opinion is any reason given why these appellants should be included in this injunction."

The Court did not say it did not have the power to grant relief against these three defendants if it had been appropriate. The Court stated that it was not appropriate to find relief against these three defendants. No reasons were adduced why they should be included in the decree.

Here the Government intends to adduce such reasons.

We do not allege that Christiana and Delaware conspired with the defendant du Pont in the acquisition of the General Motors stock, but we do allege that relief to be adequate in this case must be had against the defendants. Nothing in [fol. 19] the Hartford Empire case is appropriate to that proposition.

The defendants cite the National Lead case. This was another patent pooling case. In this case du Pont and National Lead had entered into a patent pooling agreement. In addition to injunctions, the purpose of which was

to assure that this patent pooling agreement would not continue, at the trial the Government suggested relief as against the defendants National Lead and du Pont in that certain titanium plants owned by these two defendants also be divested. The court stated that it would not grant relief as to these titanium plants for the following reasons.

> "It is not for the courts to realign and redirect effective and lawful competition when it clearly exists and needs only be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for or the feasibility of such separation, would amount to an abuse of a discretion."

Again no indication that it is not within the power of the court to grant that relief. Indeed the court's primary concern was as to the need for such relief; if such a need was found, the court's indication is that it might have granted the relief.

Here in this instant case the Government will establish the need for special relief against Christiana and Delaware. The National Lead case does not support the proposition that this court does not have the authority to grant this relief.

[fol. 20]. Finally we turn to defendants' discussion of the case cited by the plaintiff, United States versus Alcoa. A careful reading of the Government's brief citing the Aluminum case will show that the Government made no mistakes in developing it. The Government stated that these stockholders and their stockholders were found guilty of nothing. I would like briefly to discuss the facts of this case to demonstrate the rationale behind the Government's citation.

Alcoa in 1940 was found guilty of monopolizing the ingot trade in aluminum in the United States. At that time the court found that because of tariff regulations Aluminium Limited was not a viable factor in the United States market for aluminum.

Accordingly, they were not considered as a party to, or in any direct relation to, Alcoa's monopolization. In addition to Alcoa, some 18 officers and directors of that company

were found guilty of participating in the monopolization by Alcoa as officers and directors, this on the basic proposition that a company may not violate a law by itself. No corporation is any more than a scrap of paper. It operates and acts through its principals and agents.

When the case came before the Chif Judge of the Southern District of New York in 1950 for relief hearings, that court found as a fact that the stock holdings of nine of those officers had not been used in violation of the antitrust laws; that there was no indication that these officers as stockholders would or had misused their stock holdings in Aluminum or in Aluminium Limited.

There was no finding of any misuse of the stock of [fol. 21] Aluminium Limited. There was no finding that Aluminium Limited had participated to any extent in the violation found against Alcoa, namely, monopolization of the ingot market in the United States.

Nonetheless, that court granted relief against those nine defendants in their capacity as stockholders, in which capacity no violation had been found, for no other reason than that restoration of competitive conditions demanded that this type of relief be had.

The Government has cited the appropriate portions of the decision of that court in its memorandum, and will not here repeat them. However, Aluminum stands for the proposition that relief may be had which did not go to the offense charged even where there are specific findings that the parties had not misused their stock, had not intended to, but solely where it is necessary for relief.

These parties as officers had participated in Alcoa's monopolization; but neither was Aluminum a party to that violation nor were the stock holdings involved. In fact, specific findings against them were had. The relief went beyond the violation and the sole justification for that relief was a restoration of competitive conditions.

Here we ask against specific defendants that competitive conditions be restored by relief against them.

The defendants appear, in their section on Aluminum, to state that insofar as they find this case inapplicable, all is lost for the Government.

I should like to reiterate at this point that on defendant's

motion, defendant bears the burden of proof, and defendant has adduced no case in support of that contention.

[fol. 22] Defendant continues its reply brief with a statement as to the relative necessity of special relief against them.

Once again, we say this motion is premature on the question of special relief. The Government must and shall prove during this hearing the necessity for such relief.

The citation of percentages in the Government's brief, on the 599 shareholders, 132 shareholders, 34 shareholders, was meant to be demonstrative, and nothing more. This point is one for this Court to decide after all the facts are presented to it.

Now, the question was raised by the defendants, Christiana and Delaware, and was supported by the du Pont Company, that relief may not be had against the stockholders of Delaware because they are not parties to this action. The Defendants feel that plaintiff's citation of the Continental Insurance case is no authority for that proposition.

That case arose from the Government antitrust action against the Reading Company, where certain coal and railroad interests had been combined. After the combination, a mortgage instrument had been issued covering certain joint properties of the coal and railroad interests.

The Supreme Court ordered a divestiture of the coal interests from the railroad company, and the question was raised by the Continental Insurance Company, a bondholder under the mortgage instrument, that these people were not parties to the action, had not had an opportunity to be heard.

The Government on that hearing moved that a trustee for these bondholders be appointed and made a party to the case. This was done.

[fol. 23] The argument was made before the Supreme Court that these people had not been guilty of anything and their interests, their rights were being violated because their mortgage interest was going to be segregated between one or the other of the two groups of properties.

The Supreme Court stated that the mortgage instrument was a sufficient indication of the existence of an antitrust violation to place these bondholders on notice that they

were going to be subject, if the proposition arose, to an antitrust decree.

How much more is the charter of a holding company, whose function is nothing more at the present time than to hold the stock in one company, which holds the stock in another, which holds the stock in another, an indication that at some point that company, the Delaware Realty Company, may be subject to an antitrust decree.

We feel, of course, that the stockholders of Delaware are protected by the representation of their eminent and esteemed counsel, Mr. Scott.

After all, the Delaware Corporation is not a business corporation. It is a holding company. Representation of the company, particularly in this example, is representation of the stockholders because the company has no other interest than those of the stockholders.

However, if the Court desires appointment of another trustee for the benefit of those stockholders, we would not interpose any objections.

Another viewpoint may be had as to the special consideration given in this case to the status of Christiana and Delaware.

[fol. 24] Classically, the requirement of divestiture should be met by a sale of the stock unlawfully acquired. There would then be no tie remaining between the acquired and acquiring company.

Here we may view the relief demanded by the Government as a sale, with the Government interposing no objection, should the defendants attempt to distribute to certain classes of stockholders. Once again, the Government has never insisted upon a particular type of divestiture in this case; always insisting, however, that general complete divestiture be had.

The general stockholders of du Pont are a class of people who, as a rule, with certain exceptions which will be brought out at the trial, classes of people who do have no true relationship other than that of a fiscal one with the du Pont Company. However, Christiana and Delaware do have specific relationships, elements of control, to that company.

If we ask for divestiture and the Court grants the

trustee the right to make exception to a sale in the instance of general stockholders, we would not object.

Viewed in this light, Christiana and Delaware could have no objection that we were discriminating against them; that we were getting special relief against them, since the relief would not be directed to them, but an exception granted for others.

Should the Court grant a motion of this type and then refuse consideration of special relief, of special consideration to these defendants rather than special relief directed against them, the Government could not accede to the proposition of a general distribution of this stock.

[fol. 25] Christiana and Delaware own 30 per cent of du Pont, and would receive 30 per cent of the General Motors distribution. This would make it the largest single block of General Motors stockholdings in the hands of two companies, one of which is controlled by the other, so effectively in the hands of the Delaware Realty & Investment Company would be by many times the largest single block of General Motors stock.

The Government would then be forced to claim, to insist upon, insofar as it may, a sale of all of the distributable General Motors stock.

On that proposition, your Honor, I think it would be appropriate to hear from Messrs. Cox and Dallstream, as in one category or another representatives of the du Pont stockholders, as to whether or not they consider it inappropriate that the Government be permitted to grant special consideration to the general stockholders of du Pont, or whether they feel it necessary to determine that all of this stock should be sold.

In oral argument, Mr. Scott stated that the Maryland-Virginia Milk case was not contrary to the defendant's position, was not contrary to his position as to requirement of sale under Section 7.

I should like to quote from that opinion, where the Court stated:

> "The Court therefore concludes that the acquisition of the assets of Embassy Dairy, Incorporated, by the defendants, constituted a violation of Section 7 of the Clayton Act, and that, consequently, judgment should be rendered compelling the defendant to divest itself

[fol. 26] of those assets and cancel all contracts ancillary thereto."

Finally, the Government would like to discuss the Supreme Court's consideration of this very motion.

Before the Supreme Court, defendants made a motion, in which they stated that, (1) the appeal should be dismissed as to Christiana & Delaware because the Government has abandoned the only question presented to the Court which involves these appellees; (2) but even if the question relating to Christiana & Delaware had been pressed, a dismissal of the appeal as to them would have been required.

This second argument was the argument that the Court does not have the power to grant such relief.

Defendant now argues that its premise in the first argument, namely, that the appeal should be dismissed as to Christiana & Delaware because the Government has abandoned the only question presented to the Court which involved them, was granted.

The motion of course was denied. The motion was for dismissal.

These defendants said, "There is nothing left in this case as to us; therefore, we must be dismissed. But if there is anything left as to us, we must be dismissed, because this court does not have the power to grant relief against us."

If the motion for dismissal was not granted, the court felt that there was something left in the case as to Christiana and Delaware; if there was something in the case left [fol. 27] as to Christiana and Delaware, then the court ruled on the defendant's motion that the court does not have the power to grant such relief; and, in so ruling, denied that this was a valid proposition of law.

Mr. Scott has stated that this question was not before the Supreme Court, that they do not decide questions that are not raised before them. In the Government's brief, we have cited what facts were before the Supreme Court: The fact that the Government wanted special relief against Christiana and Delaware in the precise event of a distribution; that Christiana and Delaware stated that there was nothing left as to them and they should be dismissed,

and that even if there were something left this court does not have the power to grant the relief; and then the court dismissed that motion.

The court, of necessity, ruled on defendants' power argument.

Your Honor, I wish to be very clear on that last point. It is the Government's position that semantics, which is the science of words, and logic, permit no other conclusion. If my presentation has left any doubt in your mind as to the unassailability of this proposition, would you be so kind as to now ask any questions as to the truth of the proposition that the Supreme Court has ruled upon this prior argument adversely?

The Court: The Court has no questions at this time.

Mr. Metzger: Thank you, sir.

The Court: Does anybody else wish to be heard on this motion?

STATEMENT IN REPLY BY MR. SCOTT

Mr. Scott: Your Honor, could I just briefly advert to one or two things that Mr. Metzger covered?

[fol. 28] The Court: You may.

Mr. Scott: I have tried to listen carefully again to the Government, and I still cannot understand upon what they base their claim that there is power—the major issue. I am leaving aside this discussion about the Supreme Court for the moment, because I think the Court will be satisfied on that.

Mr. Metzger purports to deal with the cases we cite and says that they are not inconsistent with their position. There is no point in our carrying that discussion further. But still he is left with the Aluminum case which, he insists, is a case that is affirmatively in his support. And all I want to say about that, your Honor, is that at least insofar as the court in that case was concerned, it recognized the difference between the defendants who had been found guilty and those who had not, because in the one case it felt the necessity of getting consent and not in the other. And all of them were stockholders.

His reference to the Maryland milk case, I am frank to say I don't really understand, because I had not referred to it. I think it may have been a mistake.

As to the Supreme Court, the sole point that we are making, your Honor, is this. Of course, they intimated to the Supreme Court, said to the Supreme Court, that in the event there should be a distribution, relief by way of distribution to stockholders, they would seek some kind of special relief against us. That did pose the issue; and when they originally took us to the Supreme Court, that was the reason for including us.

When they got to the Supreme Court they said, "We are [fol. 29] not now taking a position as to whether we will ask for a distribution or not. That being the case, we are not pressing the legal issue."

And what the Supreme Court really did was to say, "We will keep these parties in the case, all issues of relief should be presented to the District Court initially." And any amount of analyses, semantics, or whatever he wants to call it, the fact remains that the Supreme Court did not consider the merits of our position, and the Government itself refused to argue the merits of our position.

Therefore, I am satisfied, your Honor, that if that is the sole basis upon which the Government is here pretending that they are entitled to special relief against us, I think your Honor will be satisfied upon a careful analysis that that cannot stand.

Mr. Metzger: If I may take one minute, your Honor?

The Court: You may.

STATEMENT IN REPLY BY MR. METZGER

Mr. Metzer: In the Aluminum case, the parties to whom Mr. Scott adverted finally were the Duke interests, which came in voluntarily at a late stage of the hearings, because of their large stock interests in the company.

The Government has made no claim with relation to those interests and its proposition stands on the parties who were before the Court. And, second, Mr. Scott's reference as to what was before the Supreme Court. I should like to make two brief citations from the Government's statements before the Supreme Court:

> "1. Adequate relief will require more than merely a distribution of General Motors stock to du Pont stockholders, on the ground the Christiana & Delaware holds

[fol. 30] approximately 30 per cent of the du Pont stock; and

"2. It was not intended in Footnote 51 of our principal brief to take any position on whether distribution of the stock to the du Pont stockholders, generally, will give proper relief. However, if this means should be adopted, the Government believes that some provision should be included to require additional relief with respect to the holdings which Christiana & Delaware would so acquire,"—

this merely to indicate that the Government had made that position before the Supreme Court, and we have already adverted to the defendant's claims before that Court.

Mr. Scott: Your Honor, there is just one point that I failed to mention before. In connection with the Continental case, I understood Mr. Metzger to say that the Court there appointed a trustee on behalf of the bondholders. That was not true. What they did was to bring in the corporate trustee of the bondholders who, in his capacity as trustee, was representing the bondholders.

It is quite a different problem than we have here before us, and I want to point out furthermore that in that case there was no effort to pick out some bondholders and say that they stood in any different position than any others. That was a true representative situation, where their own fiduciary was brought in.

To suggest that the counsel for the Delaware Company is counsel for the individual stockholders in their capacity as stockholders of du Pont, I suggest reintroduces the thing that we argued before your Honor many, many years ago as [fol. 31] to whether there could be a class action against individuals under the circumstances of this case.

Now, I would certainly agree with the position taken by Mr. Cox with respect to the stockholders of the du Pont Company, who are being reached not in their capacity as stockholders of Delaware, but in their capacity as stockholders of the du Pont Company, that they are indispensable parties, if the Government is going to press the relief against them, and they are not now represented before this Court.

RULING ON MOTION RESERVED

The Court: The Court will reserve its ruling on the motion until the conclusion of the trial.

You may proceed with your evidence.

OPENING STATEMENT ON BEHALF OF THE GOVERNMENT

Mr. Reycraft: May it please the Court, I would like to outline briefly the schedule the Government proposes to follow in presenting evidence in support of our proposed final judgment and discuss some of the facts which will be established by the evidence.

With respect to the alleged market consequences, initially the Government will offer evidence to show in a broad way the great demand which now exists in the market for high grade securities such as those of the General Motors Corporation. In this connection we will offer statistical material to show the great increase in demand by all types of institutional investors for securities of this type. Among the institutional investors whose past programs and future intentions will be examined are pension funds, mutual funds, insurance companies and eleemosynary institutions.

The evidence will show that institutional investors made [fol. 32] net purchases of 3.7 billion dollars in common stocks in 1957 alone.

The evidence will also show that based on estimates of the most competent experts, institutional net purchases will not only continue but will greatly expand over the ten-year period of the Government's proposed final judgment.

It will show that both General Motors and du Pont stocks are highly favored by institutional investors, and that there is no basis for an assumption that this preference will change.

More particularly, we will examine into the demand for General Motors stocks specifically, inasmuch as, according to the memoranda filed, this stock would be most affected by divestiture.

In this respect the evidence will show that General Motors is itself the heaviest purchaser of its own stock and that its existing programs will require not only a continuation of

this demand, but a substantial increase. There are at the present time four such programs which I will refer to:

1. The General Motors bonus plan. This program has resulted in purchases by General Motors on the New York Stock Exchange of approximately 14 million shares of its own stock over the past twelve years. The former president of General Motors has stated in connection with this program that these purchases did not affect the market price of General Motors because they were too small and were made on a continuing basis from day to day.

The evidence will show that these purchases constituted a substantial portion of the trading on the New York Stock [fol. 33] Exchange and that they did not show any discernible effect on the market price of General Motors Stock.

2. The General Motors Savings Stock Purchase program was instituted in the past few years, and has already resulted in a requirement of over one million shares a year of General Motors stock. The evidence will show that this stock is supplied by the corporation through newly issued shares due in part to the fact that the floating supply of General Motors stock on the market is very limited when measured against the great demand for it.

3. The General Motors executive stock option plan results in a futher requirement by General Motors for shares of its own stock. There is no indication that there will be any decrease in the demand from this source.

4. The General Motors Pension Fund which has current assets of over 800 millions dollars is at the present time also a substantial purchaser of General Motors stock. There is no legal limitation on the amount of General Motors stock which this pension plan may purchase.

The current income of the pension fund which must be reinvested each year is in excess of 70 million dollars and must necessarily increase each year.

These four sources of demand are those emanating from General Motors alone. While the Government has not proposed that the Court order General Motors to purchase any divested stock, the continued existence of this demand indicates a vast continuing market for General Motors stock.

Evidence will also be offered which will show that in [fol. 34] recent years there have been large offerings of

General Motors stock in the securities markets which have been sold very sucessfully.

In 1955 General Motors raised through an offering of rights to its stockholders $328 million. This offering represented, in terms of the presently outstanding $1⅔ par value stock, over 13 million shares of General Motors. Over 1.5 million shares in terms of $1⅔ par value stock were unsubscribed and were sold to purchasers outside the company by the offering group.

In 1956, less than one year later, there was a secondary distribution of approximately 1.3 million shares of General Motors stock. This offering was completely sold within one day of the opening of the books.

We will offer a market study of the action of General Motors stock prices during this period, which will show that after a minor decline General Motors stock prices continued their upward trend.

Thus within a period of one year nearly 15 million shares in terms of present par value stock of General Motors was sold on the market with none of the catastrophic effects which had been forecast.

The Court: What year was that?

Mr. Reycraft: It was in the year beginning early in 1955 and ending 1956. It covered two calendar years.

Of this amount nearly 12 million shares were sold to stockholders who exercised their options, and nearly 3 million were sold on the open market.

[fol. 35] Within a few months the Ford Motor Company came to the market in the largest single equity offering ever made. A total of $659,900,000 was offered in this one sale by the Ford Foundation. While no two stock issues are exactly alike, this experience indicates the extent of the marketing resources of the industry.

The Ford issue was unique, on the one hand, in that the company stock had never before been offered to the public. In fact, the issue was heavily oversubscribed. There are a number of factors, however, which made the Ford sale a much more difficult undertaking than the sale of a comparable amount of General Motors.

The stock was offered in very small amounts with a requirement of broad distribution. This requirement substantially added to the difficulty of marketing the offering;

and, as I have indicated, there was no established market price for Ford stock and its valuation, therefore, had to be undertaken without benefit of the history of market evaluation which exists with respect to General Motors.

Moreover, Ford earnings had varied substantially more than those of General Motors and therefore involved a greater degree of uncertainty.

Ford's market position in the auto industry is significantly less secure than that of General Motors.

Inasmuch as the defendants have raised the question of the effect on market price of "overhang" stock, it seems appropriate to comment that there is still in the Foundation some 30 million shares which will probably be marketed some day. Nevertheless the market price of Ford stock will be shown to move in relation to earnings and industry [fol. 36] prospects without any discernible effect on the stock's price from the existence of this great reservoir.

Perhaps the most direct analogous antitrust divestiture is that which occurred as a result of the judgment in the Aluminum case.

Under this judgment approximately five and one-half million shares of Aluminium Limited have been sold by public offering or by stock exchange sale. Including stock disposed of in other ways through September 30, 1957, over 6 million shares of Aluminium stock have been disposed of under that judgment. We think it of great importance to note that this divestiture is still continuing and will not be completed until 1961. A total of 8,285,040 shares will have been disposed of by the stockholders by the end of that period.

During this same period of time, the Aluminium Company has issued and successfully sold new stock amounting to over seven million shares. There has therefore been no apparent difficulty in that company's engaging in new offerings.

Between 1951 and September 30, 1958, a total of 13,780,176 shares of Aluminium stock have been successfully sold to the public.

Based on present market prices of Aluminium stock, this amount of stock would have a current market valuation of well over 400 million dollars.

The evidence will show that the price of Aluminium stock has had a substantial net advance over the period of divestiture from $8 a share on an adjusted basis to approximately $33 at the close of 1958.

We also submit that no showing can be made that the [fol. 37] price of this stock was adversely affected by the antitrust judgment. The amount of stock which was distributed under the antitrust judgment also amounted to nearly a fourth of all of the outstanding stock of that company.

We have not attempted in connection with that divestiture to measure the capital gains taxes paid by the selling stockholders. The fact that at the beginning of the period of divestiture the stock was selling at $8 and now sells for $33, indicates that the selling stockholders had a low basis and are continuing to realize a substantial gain on these sales with resulting capital gains taxes.

The argument made by defendants with respect to the hardship imposed by capital gains taxes apparently proceeds on the assumption that the defendants should be permitted to hold the stock indefinitely. The Government has every wish to accomplish this divestiture in such a way as to result in minimum taxes consistent with the accomplishment of divestiture. However, the fact that there has been an appreciation of value in the stock of nearly three billion dollars should not place these defendants in a preferred position as compared with antitrust defendants who have perhaps not realized such a substantial gain.

It would surely be an anomalous situation if du Pont should prevail in its argument when defendants of smaller size and relative level of success are required to divest unlawfully acquired stock and incur the accompanying capital gains tax.

On the basis of the ruling obtained from Internal Revenue Service, stock distributed to du Pont stockholders would be ordinary income. As the Government pointed out in its brief, whether the stock dividend was paid out as part of existing dividend or as an additional dividend [fol. 38] is a matter on which the Government expresses no view.

While on the subject of taxes, it should be recalled that the existence of the Christiana & Delaware-du Pont hold-

ing Company structure is itself the cause of very substantial taxes on account of inter-corporate dividend tax.

Thus over the past ten years du Pont alone has paid over 71 million dollars in taxes on the dividends it has received from General Motors. These taxes will be eliminated on the distribution to the stockholders.

For the past ten years Christiana has paid over 43 million dollars on taxes on dividends which it has received.

Over the past ten years Delaware has paid over 17 million dollars in such taxes.

Thus over the last ten years alone, over 132 million dollars in taxes have resulted from the holding company structure. If dividends merely continue at the present rate, the taxes due during the ten-year period of proposed divestiture would be approximately 185 million dollars.

In the most recent decision of the Supreme Court on the question of divestiture in an antitrust case, the District Court's order of divestiture in the International Boxing case was approved. The Supreme Court observed that in a monopolization case the trial court should apply the tests set forth in the Schine case. The decree should (1) put an end to the combination or conspiracy when that is itself a violation; (2) deprive the antitrust defendants of the benefits of their conspiracy; and (3) break up or render impotent the monopoly power which violates the Act.

[fol. 39] The trial court had declared that in order to destroy this monopoly we have to return to the situation as nearly as possible, to the economic conditions as they existed in 1949. And further, "I can see no way in this case that a proper decree can be formulated unless that power which Norris and Wirtz have in Madison Square Garden is curtailed. They have to get out of control."

The defendants in that case stated that the sale, even though made in the manner outlined in the decree, would result in a great loss to Norris and Wirtz.

In that case also during the period of divestiture Norris and Wirtz increased their holdings to over 219 thousand shares. It was this stock ownership and their control of stock voting power that the trial court found dictated the election of the officers and directors of the Madison Square Garden and gave to Norris and Wirtz the unquestioned control and management of its activities.

Now in this case du Pont had the option to exercise its rights or to sell on the market that existed for its stock. They exercised the rights and increased their holdings by 3 million shares. In commenting on the argument that the enforcement of the boxing decree would be burdensome, the Supreme Court said, "If experience proves unworkable, the parties under the decree may apply to the court for relief."

The Supreme Court also said in that case, "It is anti-trust policy not only in Clayton Act cases, but in Sherman Act cases, to decree dissolution where the creation of the combination is itself the violation."

The opinion goes on to say that, "This is one of those situations where the injunctive process affords too little relief too late."

[fol. 40] These observations were made in a Sherman Act case where Congress had not specifically set forth any statutory remedy which should apply.

In the Clayton Act, Congress clearly indicated that the remedy should be an order requiring the company to divest itself of the stock in the manner and within the time to be set by the Court.

It is the Government's conception of this hearing that its purpose is to determine the manner and timing of this divestitute, and in this connection we think that all parties and Amici Curiae should submit to the Court such plans.

We are aware that a number of such plans have been studied, and are being studied on behalf of the defendants and the Amici. We think their obligation is to the Court, to submit them for the Court's evaluation in order that the Court itself can pass upon them.

Turning to the trade relations which have existed between the two principal defendants over the past few years, the evidence will show that nearly 90 percent of all the du Pont sales to the automotive industry are to General Motors. The dollar value of du Pont sales to General Motors in 1955 were approximately 70 million dollars. This figure exceeds by 43 million dollars the total dollar value of du Pont sales to General Motors in the highest year previousy shown in the record. These facts show that a mere rearrangement of the voting rights such as has been proposed by du Pont, would be totally inadequate to remedy the violation of law.

It seems too obvious to require elaboration that so long as du Pont has an interest in General Motors earnings [fol. 41] it will have an incentive to favor General Motors over competitors in the development of new products in the automotive industry. The importance of chemical products or products of the chemical industry to the automotive industry will be a matter on which we will also offer evidence.

As to these market relations du Pont has a long head start over all its competitors in selling its materials to General Motors, and General Motors, in turn, has a head start over its competitors in obtaining these products and related services from du Pont.

Before concluding I would like to refer to statements which have been made in the defendants' briefs, and as to which I trust they are going to offer evidence at this hearing. One is that the price of du Pont stock would decline by 15 per cent as a result of the proposed divestiture, and another, that the market price of General Motors stock would be depressed by between 25 per cent and 40 percent. We simply don't believe this, your Honor, and we have discussed this with numerous experts, and as many people as we could find who would discuss it, and we didn't find anyone else who agreed with it either.

The Court: Do the defendants wish to be heard?

Mr. Cox: With the Court's permission I would like to make an opening statement, if I may.

The Court: You may. I will treat Mr. Reycraft's remarks as being an opening statement.

The Court: The Court would like to advise Counsel that the trial will be resumed in the mornings at 10:15, after the motion call.

[fol. 42] OPENING STATEMENT ON BEHALF OF DU PONT COMPANY

By Mr. Cox: May it please the Court, in our opening on behalf of the du Pont Company, I think that perhaps I can be of most assistance to the Court at this point in the hearing if I direct myself to the relationship of the evidence that will be presented on both sides to some of the more important issues in the case, instead of trying to make a

detailed summary of that evidence. I shall indicate its general character, but I shall not attempt to discuss it in detail.

There are two general questions that seem to me to be of overriding importance in this hearing.

The first of these is the question that can be simply stated in these words: what provisions should the Court make in the final plan about the 63 million shares of General Motors which are owned by du Pont, and which the Supreme Court has held were acquired in violation of Section 7 of the Clayton Act?

There is another question of great importance, and that is whether the plan that the Court adopts with respect to those shares should contain some extraordinary or special measures of relief directed against certain selected stockholders of the du Pont Company.

That is the question that has been brought into the case by the Government's contention that some kind of special relief is necessary as to Christiana, Delaware and the du Pont stockholders who happen also to be stockholders of Delaware.

Now, that is a question that falls within the province of [fol. 43] Mr. Bushby and Mr. Scott, and I do not intend to say anything about it in my opening, except as it may relate to the first, or more general question, what is to be done about the 63 million shares?

I think in considering the nature of the evidence, it may be useful to start by comparing the plan submitted by the du Pont Company, so far as it concerns the 63 million shares, with the plan that was submitted by the Government, because I think that comparison will show what the basic difference is.

There are similarities, but there is a very basic difference, and I think by looking at that difference, we can get some idea of what the significance of some of this proof may be.

Let me first consider the essentials. I am not going to try to do it in detail, but let's consider the essentials of the du Pont plan.

That plan rests on the premise that this Court should formulate a final judgment which will eliminate the effects of the acquisition of the stock which are offensive to the statute.

Those are the words that the Supreme Court used, and we think the particular words used by the Court are significant, because those words refer to an effect of the acquisition of the stock that is offensive to the statute; and the words show that the significant thing is the relationship between the attributes of the stock, what can be done with the stock, and the possible restraint of trade which the Court found existed under Section 7.

That effect, it is unnecessary to remind this Court, I [fol. 44] know, was found by the Supreme Court to be the possibility or probability that the stock, the attributes or power inherent in the stock, might be used by the du Pont Company to influence purchases by General Motors of automobile fabrics and finishes.

What the du Pont proposal does is to deal with those attributes of the 63 million shares, those aspects of the power inherent in the shares, which are related to this possible offensive effect.

To that end, the plan proposes that the right of du Pont to vote the 63 million shares be absolutely and completely and permanently divested, and that it be passed along on a pro rata basis to the thousands of stockholders in the du Pont Company.

To deal with the arguments that the Government makes about the possible concentration of the vote in Christiana & Delaware, the du Pont plan further contemplates that those two corporations will consent to pass the vote on to their stockholders, so that this concentration that the Government fears will be avoided.

The two corporations have joined in this proposal, as Mr. Scott has explained, without prejudice to their ultimate legal position that there is no legal basis upon which the Court can, without their consent, grant this relief against them.

Now, I should like to pause here just to say a word about some things that the Government has said this morning, about the stockholders of Delaware, and these things are also said in the memorandum they filed.

The Government takes the position that even if you pass [fol. 45] the vote through Christiana and Delaware, so that those two corporations no longer vote the stock as a

block that concentration in the corporations is gone under the du Pont plan, and the Government concedes that.

But, it says, you will get a concentration of votes in the hands of the stockholders of du Pont, who happen also to be stockholders of Delaware. They have a computation in their memorandum, in which they arrive at the conclusion—I take it to be illustrative; I am not trying to bind them to it—that there will be a concentration on the order of 3.75 per cent if the vote is passed through.

I should merely like, without elaborating the point, because I am sure Mr. Bushby will deal with it, to say this to the Court about that argument: It is an argument, of course, that assumes that there is some cohesion or common plan or purpose that exists among the stockholders of Delaware, so that they will be in a position, and indeed will act as a unit in casting their votes in General Motors.

I suggest, in the first place, that there is no basis for that assumption in the record that was made before this Court in the trial on the merits.

I suggest that the Government will have no proof that would justify the Court reaching any such conclusion in this hearing.

I think that what the Government is trying to do there is to assume, without proof, the existence of the conspiracy which they attempted to prove and failed to prove in the hearing on the merits.

Leaving that aspect of the plan, I now should like to point out that the other part of the du Pont plan, which is [fol. 46] significant in this connection, is the provision it makes for dealing with interlocking directorates.

Under the du Pont proposal, the Court may prohibit all interlocking directorates between du Pont and General Motors, if the Court decides that is what should be done.

Alternatively, the Court may, if it decides after hearing the evidence that less severe measures are adequate, impose restrictions on the number and the activities of any directors who remain on both Boards. But the power is there under the plan to prohibit it altogether.

Now, these, in sum, are the proposals of the du Pont Company for dealing with the 63 million shares. We submit that they are simple; that they are direct; that they are easily administered and enforced; and what is more important, they are effective, because they operate on every

attribute, every incident, every aspect of power inherent in this stock that might possibly be used in any way to influence the course of commercial relations between du Pont and General Motors.

What they do is to leave du Pont, with nothing but a bare beneficial interest in these 63 million shares. For years the du Pont Company has passed on all of the dividends it gets from General Motors, less the dividend tax, to its own stockholders.

So that this bare beneficial interest which I am talking about, as a practical matter, amounts to nothing but a highly abstract right to receive a pro-rata distribution of assets, in the unlikely event that General Motors should ever be liquidated and there should be anything left for distribution to common stockholders.

[fol. 47] What we are dealing with here is the barest kind of title, nothing more; a piece of paper which represents that abstract right. Everything else has been divested.

Now, that is what the du Pont Company proposes that the court should do. I should now like to deal with the plan that the Government has advanced.

I find myself in some uncertainty when I come to this because at points I am not quite clear what the Government's plan is, but I think I am entitled to assume that it is the plan they first filed with this court. They whittled away at it in their subsequent documents, and suggest that they might change it this way or that way, but, I take it, I am entitled to believe they mean what they said when they filed that plan, and that that plan is their plan.

Now, the great difference between the two plans, and this is the difference that strikes at the very thing your Honor mentioned when you first came on the bench this morning, the interests of the innocent stockholders.

The great difference between these two plans is in their treatment of the bare beneficial interest; this empty title of the du Pont Company, which might entitle it to a share in the assets of General Motors if that company should be liquidated.

The Government takes the position that it is not enough to divest the voting; that it is not enough to get rid of the interlocking directorates; that you must go beyond that, and you must require the du Pont Company to divest itself of this bare beneficial interest.

The Government provides, moreover, that this divestiture has to be done in a fixed ten-year period. It says that [fol. 48] it should be done in the following way: All the shares of General Motors which are held by du Pont, Christiana and Delaware, should be delivered to a trustee, and that each year for ten years that trustee should distribute to du Pont stockholders, other than Christiana, Delaware, and the stockholders of Delaware, one-tenth of their allocable pro rata share of the General Motors stock.

That stock in total amounts to approximately 43 million shares would, as I said, be distributed in ten equal annual installments. That would be in the order of four million, 381 thousand shares a year.

Now, as to the stock owned by Christiana, Delaware and the stockholders of Delaware, a different kind of distribution is provided for. They are those shares, together with a half a million shares that Christiana owns outright, which Mr. Scott mentioned, that are to be sold by the trustee at public or private sale.

Again, presumptively at least, in the first instance, a trustee is directed to do it in ten equal installments. He has some power to defer sales if he thinks in any one year the market isn't right, but if he doesn't sell those shares one year, he has to sell them the next year or the year after that because they all have to be sold in ten years.

Now, may it please the Court, it is these provisions for dealing with this bare equitable interest, this bare title, these provisions in the Government plan, that create the basic difference between us in this case, and I think create the most serious problems which the Court will have to solve.

We believe this beneficial interest, this piece of paper, is [fol. 49] of no consequence so far as Section 7 of the Clayton Act is concerned, or so far as concerns any possible restraint of trade. But the passage of that bare legal interest does have enormous legal consequences of another kind, and it is to those consequences that I should like to direct my comments.

Let's consider first the 4,381,000 shares of General Motors which, under the Government plan, must be distributed every year to the stockholders other than Christiana, Delaware, and the stockholders of Delaware.

As the Court knows, the Internal Revenue Service has ruled that these shares when distributed will be fully taxed as ordinary income to the individual recipients in the year in which the shares are received, and they will be taxed at the market value of the shares on the date of distribution.

This will be true at all times unless the situation arises in which du Pont does not have current accumulated earnings or surplus or profits equal to the relatively small cost of General Motors stock distributed in a year. That is a situation so unlikely that I think we can disregard it as anything likely ever to happen.

This means that these shares which are going to be distributed to these people every year will be taxed as ordinary income at rates that will range from 20 per cent to 90 per cent, depending upon the rates applicable to the taxable income of the particular stockholder.

It also means, of course, that those shareholders who live in States where there are income taxes will also have to pay personal income taxes on distribution of those shares, subject to whatever arrangements the State law makes for credit as against Federal taxes.

[fol. 50] The stockholders of Delaware, as a matter of fact, who also happen to be stockholders of du Pont, are in a very curious situation. They will have to pay income tax, as I understand the situation, on the market value of the General Motors shares which are delivered to the trustee and which are allocable to them, so then that tax will be fixed, at least the base for the tax will be fixed, at the time each year that the trustee makes his general distribution of shares to all stockholders.

If the trustee doesn't sell the shares at that time, but waits for a propitious time in the market, and those shares go down, the Delaware shareholders may find themselves in a position where they are required to pay a higher tax on the value of the stock than they are able to obtain from the proceeds of the stock when it is sold by the trustee. That is a curious aspect of the Government plan which, no doubt, Mr. Bushby will advert to.

Of course, I have been talking so far about men and women who pay taxes. Corporations who own du Pont stock will also have to pay ordinary income tax on this distribution, but because of the peculiarities of the tax law,

which I will not go into now, the taxes imposed upon corporations are at a very, very much lower rate.

Now, let's consider—I think it is very useful to me, at least, and I hope it will be to the Court, to consider this thing specifically. Let's consider a man or a woman who owns stock in the du Pont Company.

These shares are in every economic sense capital assets of the du Pont Company. They are just as much a capital asset as a parcel of real estate or a factory is.

[fol. 51] What the Government requires, therefore, is the distribution really of a capital asset, each shareholder of du Pont receiving his pro rata share of the asset. But because of the technicalities and the peculiarities of the tax law, the stock when distributed under the Government plan is taxed as income.

Now, this is the ruling of the Internal Revenue Service. We are not disputing it. We have to take it in this case as right, but all I am saying to the Court is that the artificialities and intricacies of the tax law can't change economic facts. So, what we are dealing here with really is an income tax in law, but a capital levy in economic fact. That is the fact of the matter.

When an individual stockholder of du Pont who is in the lowest tax bracket, say 20 per cent, receives a share of General Motors on distribution, he has to hand over to the Government under this plan a fifth of that capital asset in the form of income tax. Of course, if he is in a higher bracket, even a larger percentage will be taken away from him in the form of this capital levy; and if he gets in the very high brackets, 85 or 90 per cent of it will be taken away from him.

There can't be any denial of these tax consequences. I don't think the Government will dispute them. They are simply a matter of arithmetic.

We believe that we will present evidence in this case which will convince the Court that there are approximately, or let me put it this way, that there are between 250,000 and 300,000 men and women who, either by reason of direct title ownership of du Pont stock or beneficial ownership in that stock, will be subject to this kind of a capital levy.

[fol. 52] We think that evidence will also show that the average rate at which these men and women will be taxed will be somewhere between 55 and 60 per cent.

The Court: The Court will now recess.

(Whereupon a recess was taken in the above-entitled cause until 2:00 o'clock p.m. of the same day, Monday, February 16, 1959.)

[fol. 53] Monday, February 16, 1959,
2:00 o'clock p. m.

Court convened pursuant to recess.
Present: as before.
The Court: Proceed, please.

Mr. Cox: May it please the Court, when the Court recessed for lunch, I was discussing the tax consequences of the distribution of the shares that under the Government plan are to be distributed in kind each year to the stockholders of du Pont, other than Christiana and Delaware and stockholders of Delaware. I am not going to expatiate at this time upon the hardship that will be inflicted upon the individual stockholders by this distribution, nor am I going to dwell in detail on what will certainly be the adverse effects of this distribution upon the market price of both du Pont and General Motors. Those are matters that will be covered fully in our proof.

But before I leave this aspect of the argument, I should like very briefly just to state again to the Court, so that we all understand what we are talking about, in very specific terms, and I would like to take the situation in this most simplest and least painful form. I don't want to be accused by the Government of making an appeal based upon the existence of hypothetical widows and orphans. So let us take a case that involves one share of General Motors, [fol. 54] and let us suppose that the stockholder of du Pont has ample funds from other sources with which he can pay the tax, and let us, to make it even less painful, suppose that this taxpayer is in the lowest tax bracket—he pays a tax at the rate of 20 per cent. Now the question we have here is why, even in those circumstances, should a court of equity force upon this stockholder a distribution of assets that will necessarily mean that he will receive only four-fifths of the assets in which he invested his savings.

What the Government is doing is saying, on the one hand, to the shareholder, "We are now going to force you to take back a part of the capital that you have invested in the stock of the du Pont Company. You have no choice in the matter. We are going to make you take it, although the circumstances which lead us to do that is a thing for which you are not morally or legally responsible." Then they say, on the other hand, "Although we are forcing you to take this capital back against your will, at the same time we are going to take one-fifth of the capital away from you in the form of a tax."

Today, on the New York Stock Exchange, let us say, for example, the stock of General Motors is selling for around $50.00. I think it is slightly less than that. But the Government says to the taxpayer, "Although your stock is worth $50.00, we are only going to let you receive $40.00 for it, if you are in the 20 per cent tax bracket." And of course, as the tax goes up, the results are even more startling. As I said, if he is in the 50 per cent bracket, he keeps only $25.00 of the $50.00 market value; and if he is in the 80 per cent bracket, he keeps exactly $10.00.

[fol. 55] Now these tax consequences that I am talking about can't be changed by extending this period of distribution over a longer period of time, although the Government's plan doesn't provide for that. In a longer period of time a taxpayer's income situation may change, his income may go up, or it may go down, but no matter how long the period, these distributions will be taxed at exactly the same rate and in the same way that I have described.

Now in the memorandum that the Government submitted in support of its plan, the Government laid some emphasis on the fact that you could deal with this situation without imposing any additional income tax on the shareholders by simply using this stock completely in lieu of cash to pay the du Pont dividend.

So that, under that plan, the du Pont Company would not pay a cash dividend at all; it would simply deliver to a shareholder a dividend in the form of General Motors stock.

I detected in Mr. Reycraft's opening this morning some diffidence about that proposal. Perhaps they have had second thoughts about it. But that proposal doesn't even

have surface plausibility, it seems to me. It has consequences, some of which are different, but I think even worse than the consequences that will follow if you pay the stock out on top of the dividend. Of course, if you pay it out on top of the dividend, you may in some cases, probably in many cases, increase the taxpayer's tax, because it will put him in the higher tax bracket; but let us consider what happens if you pay it out, the dividend, entirely in stock and no cash.

[fol. 56] I suppose I hardly need labor the point that you cannot pay rent or buy food or pay a child's tuition with a share of stock; and what is more important, you can't give it to the Collector of Internal Revenue in satisfaction of a tax debt. If that kind of a plan is followed, the stock, in almost every case we can think of, would have to be sold in whole or in part; certainly a very large part of it would have to be sold, because the taxpayers, the stockholders of du Pont would need the cash, and that would be true even of certain kinds of institutions which might not have a serious tax problem, but which need the revenue; it would be true, for example, we believe, of many charitable institutions.

So that this stock distributed as a dividend would have to be thrown on the market. It would be thrown on the market, in addition to the forced sales that the trustee is required to make.

So that any proposal of this kind, just as much as a proposal to distribute the stock on top of the dividend, involves the impairment of a capital asset; it forces the stockholder to take shares instead of cash, which he must then sell on a declining market in order to pay his taxes, and to live.

And I think I should say to the Court at this point that under the Government's plan, as it has been submitted to this Court, there are only two alternatives about distributing this stock. You can distribute it on top of the dividend, or you can use it completely in lieu of the dividend.

In its memorandum, the Government talks about possibly splitting the dividend and paying it partly in cash and partly in GM, General Motors, stock; but, on the Government's own computation, you couldn't possibly do that in [fol. 57] the ten years which is the period of time that they

have fixed in their plan as a mandatory period of time when this all has to be done.

They have a computation, themselves, which I think is somewhat unrealistic but which shows, if you assume a market price of $40 for General Motors and a dividend rate from the du Pont Company about the same as it has been in the past, if you paid it out half and half, it would take nineteen years; and, as a matter of fact, we think it can be demonstrated that it would probably take a little longer.

There is a curious aspect of that proposal or suggestion of the Government's. It is not a proposal, really, but their suggestion, which they don't seem to realize, or at least they are reluctant to comment on, and that is this: That, of course, if you pay, if the du Pont Company uses the stock to pay the dividend, the inevitable result of that is that the du Pont Company accumulates, assuming its earnings remain the same, it accumulates an equivalent amount of cash so that over whatever period of time you did this, if you assume that the market value of the stock remains the same, the du Pont Company would accumulate between two and one-half and three billion dollars in cash.

Now that seems to me a very curious position for the Government to be in. This rather turns the litigation upside down. Ever since this litigation started ten years ago, the Government has talked about the importance of decreasing the size and the power and the potential position of du Pont as an industrial unit, and yet they make a suggestion which could have no effect but to enormously in-
[fol. 58] crease that position, because du Pont would either have to do one of two things with that money—it would either have to invest it in the chemical or some related industry, with problems which the Government certainly should be very sensitive about, or it would have to buy securities of other companies in some way. If it did that over this period of time, it would turn into an investment trust which would be larger, so far as I know, than any existing investment trust in this country. The Government never seems to come to grips with that aspect of this suggestion about paying, using the stock to pay a dividend.

Now, may it please the Court, as I have said, these are consequences which the Government must face, and I think

must justify. They can't just wash their hands of them and say, "That is the tax law." The problem here is why—now I am going to come back to this question again—Why must these things be done? What is there in the facts or in the law that makes it necessary to impose this kind of capital levy and to inflict this impairment of capital upon the stockholder?

Certain other problems of a different kind are raised by the proposal for the trustee's sale. Now that proposal contemplates that in a ten-year period more than 19 million shares, nearly 20 million shares of General Motors will be disposed of at public or private sale. If those shares are sold in ten equal installments, that will be nearly two million shares a year—one million nine, or something, I think is the accurate figure.

General Motors now has a market value somewhere in the neighborhood of $50—$47 or $48—on any view, the proposal requires sales in the amount of nearly a hundred million dollars each year for an aggregate over the ten years of nearly a billion dollars in sales.

[fol. 59] Now the significant thing about the sales, may it please the Court, is that they are forced sales; they are sales that have to be made. It is true that the Government plan is that you may defer sales from year to year but what you don't sell one year, as I said this morning, you have to sell the next; so that if you avail yourself of that right, if a trustee does, he just postpones the day when this stock gets to be thrown upon the market.

What is the Government's position about these sales? I listened carefully to Mr. Reycraft this morning. At points I thought he was saying that this stock could be sold without any effect whatsoever on the price of General Motors in relation to its historic price, in relation to other securities. At other points I thought he was saying, "It will drive the price down some, but perhaps not as much as the defendants say."

I suppose we must wait and see what the Government's evidence is.

But on some points, it seems to me thought that we can be fairly confident now, and this is one of them: I do not see how the Government can be dogmatic on its assurances at this point. It certainly cannot guarantee this court or anyone else that throwing this amount of stock on the mar-

ket in forced sales is not going to have a substantial and seriously depressing effect upon the price of General Motors.

And you cannot ignore the fact that we are here not only dealing with a hazard which is very great; but we are dealing with enormous stakes, because there are more than 700 thousand shareholders of General Motors who will be [fol. 60] directly affected by this price decline, and many of these shareholders are institutions which in turn represent other people who have an indirect but nevertheless substantial interest in the market price of General Motors.

Now the Government's plan makes no allowance for these hazards; it simply provides that the stock must be sold within the ten-year period, and I suppose we are entitled to assume that the Government means what is says and that the stock will have to be disposed of at the end of that period, irrespective of market conditions or of the price.

We believe that our proof will satisfy the Court that this huge block of stock cannot be forced upon the market without causing a substantial decline in the market price of General Motors. We believe the proof will satisfy the Court that this will be true, even if these forced sales should be extended over a longer period of time.

And I should like, while I do not intend to review that evidence in detail—I should like to say this to the Court about it: It will be evidence from the mouths of men who have had practical experience in dealing with p.oblems of a kind that will be involved in the sale of this stock. It will not be abstract or academic general evidence or theoretical evidence.

I think it may be useful, although without commenting on that evidence in detail, for me thus to recall certain rather simple facts that the Government seems inclined to ignore about the operation of the market, of the forces of supply and demand. Theses are facts that it seems to me we cannot obscure or run away from by any kind of economic jargon or statistical manipulation. They are facts that we all know. [fol. 61] The market price of General Motors that now prevails and has been fixed in the past is a price that has been fixed on the security exchanges of this country by the interaction of supply and demand and a free market. That is the market in which buyers and sellers have made a decision to buy and sell of their own volition without inter-

ference, and on the basis of normal business considerations. And that price, the price that exists today, the price that existed through the last ten years, has been a price determined in that way, by and large, and it represents a balance between demand and supply.

I don't see how anyone can dispute that fact.

The Government now comes along and proposes to disturb that balance by forcing upon the market a huge supply of this stock. It proposes to force an increase in supply upon the market.

Now the Government's plan doesn't provide for any increase in demand, and I was interested to listen to Mr. Reycraft this morning, when he talked about the demands of stock, and he had some very large general figures; but of course Mr. Reycraft does not help himself by telling this Court or proving to all of us what we know, which is that a very large amount of money is available for investment in equity securities. We are concerned here with a particular security, with a stock of a particular company, and the real question is how much increased demand there will be for General Motors, which will counteract this forced increased supply; and that is the only kind of evidence we submit will be persuasive on the issue which I am now discussing.

I think another thing the Government overlooks is that [fol. 62] this demand which they speak of is a demand that already exists and is already reflected in the price, and it doesn't help them to talk about the purchases that people have made in the past of General Motors, or General Motors' own purchases of its own stock.

For example, was that demand reflected in the normal price that exists now, and if you add to that normal supply against which that demand has been set an increased forced supply, you still have the problem of increased demand to absorb that supply of stock which is thrown upon the market.

I was also interested in listening to Mr. Reycraft's remarks about other stock issues in recent years, and we shall have evidence, may it please the Court, that will deal with all of them, and I think the significant thing to note about them now is that not one of those situations is in any degree comparable to what the Government proposes here.

Mr. Reycraft talked about the Aluminium, Limited situation, and in the interval of lunch I didn't have time to be sure that these figures are absolutely accurate, but so far as I was able to find in that interval, the figures indicate that in an 8-year period in that situation, the sales were made of about six and a half million shares with a market value of 141 million dollars.

Well, under this plan, the trustee must sell 100 million dollars of stock every year. In two years under this plan, you have to sell more than have been sold in eight years under this Alcoa situation.

These situations, I mean the ones that Mr. Reycraft talks about, are in no sense comparable to the problem that is [fol. 63] involved here where the proposal is that this amount of stock be sold year in and year out. You would make a sale one year, and you would no more than finish that, than you would have to get ready to sell the same amount the next year.

Mr. Reycraft talked about the Ford issue, which is not at all comparable. He made one very interesting observation which gave me some hope, when he said that we couldn't say the stock would overhang the market, because the Ford Foundation stock hasn't overhung the market.

But as your Honor knows, the Ford Foundation has a very large amount of stock which it holds. Of course, if Mr. Reycraft wants to withdraw the plan he now has before the Court and will substitute a plan which will put the du Pont Company in the position that the Ford Foundation is in, I think that Mr. Reycraft and I might have a basis for conversation, because the Ford Foundation never has to sell a share of stock if it doesn't want to. It can hold that stock from now until doomsday waiting for a price. So there is no comparison in those two situations.

Now, we must remember that all of the time the trustee is selling this huge amount of stock year in and year out, the stock price of General Motors will be under pressure from another angle, because as I have explained earlier in my description of what would happen on the distribution, the shareholders of du Pont who are receiving this stock, would certainly be selling part of it on the market, and that will increase the pressure. And these forces will be cumulative because as the price of General Motors goes down, and the shareholders of du Pont need money to live or to pay

[fol. 64] income taxes, they will have to sell more General Motors in order to get the money that they need and, of course, if anyone should ever think of adopting the Government's proposal that the du Pont dividend be paid entirely in General Motors stock, the pressure would be enormously increased.

Now, your Honor, at the risk of repetition to the point of being boring, I again ask why must all of this happen? Why must this be done? I think the Government, as I have said, has a heavy burden because it can only be justified if the Government can convince this Court that there is no other conceivable way in which the effects of the acquisition of this stock that is offensive to the statute, can be eliminated.

Now, what has the Government to say on that point? Can they seriously contend that the retention by du Pont of this bare beneficial interest in this stock can in fact—I am talking about facts, now—can in fact influence the course of trade between the two companies? How can this be so? How can the fact that there is a piece of paper in a vault in Wilmington instead of thousands of pieces of paper in the hands of scattered stockholders—how can that fact influence trade?

There is no light that will influence the directors as eliminated, the dividends are passed on? What is it in this situation in fact that could possibly influence those trade relations?

Mr. Reycraft said this morning, he merely said it—that if our plan was adopted General Motors would still have an incentive to purchase from du Pont. I ask why, your Honor, and we are entitled to an answer, and I think the Court is. [fol. 65] What are the facts that lead to that conclusion? Are there any? Why should that be so?

If the du Pont plan is adopted, this stock will really be almost substantially in the position of a debt security, except it will not have a secured position in the event of liquidation. It will have no capacity to influence the trade.

Now, I think there is a significant way, one significant fact about this that casts very grave doubts on the Government's position on the facts.

Your Honor will recall that throughout this case on the merits, a great deal of the Government's effort was directed to this point, and they put in evidence and they made many

arguments which were directed to the influence this stock had. And those arguments all went, and their proof all went to the right to vote, and to the directors, and to such matters, and they put in exhibits to show what percentage of the stock at the meetings was voted by the du Pont Company. They put in tables of the directors. That was their evidence on this question of influence, and indeed in their memorandum which they submitted in the fall of last year, much of that memorandum was given over to the same kind of arguments.

They didn't have any kind of arguments that the beneficial interest, this piece of paper, could influence trade, and I expect your Honor that in the end there will be no arguments on the facts, so far as that point is concerned, and that what the Government will do will be to fall back on their argument at law which it seems to me was essentially Mr. Reycraft's position this morning.

[fol. 66] Their argument is simply this: that no matter what the facts may be, no matter what hardship may be inflicted on the stockholders, that your Honor has no choice, that you must order the divestiture of this bare beneficial interest because the statute commands you to do it. And they are trying to support that argument by saying that even if the statute doesn't command you to do it, the Supreme Court commands you to do it when it sent down its mandate.

Now this is a curious argument in a number of ways, and one way it is curious is because it is an argument that says that you have no choice, not only to order divestiture, but you have got no choice between different kinds of divestiture. It is not enough to divest the votes; you have to divest the bare equitable interest.

It is curious in another respect because of the kind of statute on which they rely. We have this morning filed and served upon the Government, a brief which discusses this point, and I don't propose to repeat the arguments in that brief. I think the brief makes the arguments and disposes of the Government's contention, but I would merely like to say this, your Honor, first as to the argument that the Supreme Court told this Court that it had to order divestiture of this bare beneficial interest. I will compliment Counsel for the Government by saying that it takes a bold man to make that argument, because the argument

requires you to assert that when the Court said one thing it meant directly the opposite.

The Court in its opinion said that this Court had wide discretion to devise a remedy that would be adequate and effective with reference to the facts of this particular situation. The Government says that while the Court used those words, that is not what it meant; it meant you didn't [fol. 67] have any discretion at all in one respect, that you had to order divestiture, and you had to order a particular kind of divestiture.

I think that argument really hardly deserves the time I have devoted to it.

The statutory argument is a very curious argument, because it relies entirely upon a statute that has nothing to do with the power of the District Court. We have set that statue out *in toto* in the back of our memorandum, and when the Court looks at it you will see that it is a statutory provision, Section 11 of the Clayton Act, which is devoted entirely to a description of the procedure that should be followed by administrative agencies in enforcing Section 7 and certain cognate provisions of the Clayton Act. It doesn't have anything to do with the equitable powers of the District Court, and may I say I think with confidence that no Court has ever construed it as having that effect. On its face, it couldn't have that effect, because it doesn't use the word "Court" in the one sentence on which the Government relies.

I think I will hardly need emphasize to this Court that when Congress intends to tamper with or restrict the historic equity powers of a Federal Court, the power that this Court has had sitting as a Chancellor for one hundred years, Congress always does it explicitly. It did it in the Norris-La Guardia Act, and it did it in a few other cases where it was dealing with jurisdiction of, and the equitable powers of, the Federal Court. It doesn't do it by implication or inference, and it doesn't do it in the section of the statute [fol. 68] which deals with administrative agencies which are creatures of Congress in quite a different sense than can be said to be true of any court.

So I think when we look, may it please the Court, at the legal argument, it becomes apparent, that the statute upon which the Government relies in fact has no application here, and this Court, as the Supreme Court has said, is left with a

wide range of discretion—the discretion which a court of equity has always had. It is our position that this Court has the power to choose between one kind of divestiture and another. It can, if the facts, as we believe they will, sustain that conclusion, decide that divestiture of the voting rights and a judgment that operates on the directors will satisfy the requirements of the statute here, and will not impose these severe and harsh confiscatory penalties upon thousands of innocent persons.

The problems that are presented in this hearing are extremely grave and complex, and they are problems for all of us, and ultimately for the Court, and certainly for the defendants, but I think also for the Government. It seems to me that the Government has a real responsibility here as law enforcers of the federal power to see to it that no step is taken that is not required, in fact, to deal with the violation of the statute which the Supreme Court found, because we are not here to punish or to penalize. We are here to devise a remedy, and we submit, may it please the Court, that that remedy can be devised within the framework of the du Pont plan, and that the burden, the harshness—harshness to the point, I submit, of brutality—that is involved in the Government plan, need not be approved by this Court.

[fol. 69] OPENING STATEMENT ON BEHALF OF THE DEFENDANTS CHRISTIANA SECURITIES COMPANY AND DELAWARE REALTY & INVESTMENT CORPORATION

By Mr. Bushby:

My name is Bushby, and I represent Christiana Securities Company and Delaware Realty & Investment Corporation.

In addition to the principle which your Honor enunciated this morning in opening these hearings that justice may be done, equity must be done, and no innocent persons injured unnecessarily, there are two fundamental legal principles which should govern these hearings.

One was discussed by Mr. Scott on his motion this morning, the principle that no relief may be granted against a party, that is without his consent, unless a cause of action is alleged and proved against him. That is fundamental to our

law in all fields, and any contrary finding or holding, I am sure, would startle the whole bar.

Now, the other fundamental principle was the one for which Mr. Cox has just spoken so ably; that there is nothing in the Clayton Act that requires this court to divest the bare investment interest of du Pont in General Motors or do more than see that the vote is not in du Pont, and that du Pont does not exercise influence by electing directors to the board of General Motors.

Any other conclusion here would startle certainly all the lawyers in the antitrust field in the country.

In fact, there are examples of cases under Section 11, the administrative section of the Clayton Act, where [fol. 70] divestiture was not ordered, at least divestiture of the investment interest. It was considered in those cases—and I refer particularly to railroad cases—considered in those cases by the Interstate Commerce Commission that the divestiture of the voting power was sufficient divestiture to cure the evils condemned by the statute, at which the statute was aimed.

That being so, we say that it is sufficient that this vote be divested from du Pont and passed through the three corporations to the ultimate stockholders.

I think there is a very strong burden on the Government in these hearings to make a showing of the necessity to which they referred this morning, the necessity of distributing or divesting the bare economic interest. I think they have got to show something more than a punitive desire, and I am afraid that is all it is; that is all that has been demonstrated so far.

Now, our motion this morning to exclude from consideration the provisions of the proposed Government decree aimed against Christiana and Delaware was not an idle one. Those provisions are the most lawless and destructive and vicious in the proposed decree. Let me just point out a few of the results of those provisions.

The market value of General Motors is now $50 a share. Consider the 20 million shares which are now owned, 500 thousand of which are now owned by Christiana and another 19 million to be distributed to it and Delaware by du Pont.

Suppose they are sold by this trustee and the trustee gets $40 for the shares, which I think would be optimistic. The capital gains taxes payable by Christiana and Delaware would be $179,863,000.

[fol. 71] The market loss on the 19 million shares is $190 million, or a total direct loss for the two companies on the General Motors stock alone of $369,863,000.

But, in addition to that, we are going to show in these hearings that the plan will have a very destructive effect on the market price of du Pont stock, and of course, Christiana and Delaware have a heavy direct or indirect investment in du Pont stock.

If du Pont stock is depressed 25 per cent, which I think would be shown to be conservative here in the course of the hearing, the loss on Christiana and Delaware holdings in du Pont will be $721,170,000. That is a total loss, a grand total loss of $1,093,033,000.

Now, that is more than the present market value of the General Motors stock which Christiana and Delaware own directly or indirectly through du Pont. They have about 19 million shares—it is 19,100,000 shares, which have a market value of $950,000,000, but the loss through this Government decree will exceed that.

It would be better for Christiana and Delaware if the General Motors shares allocable to them were just given away by du Pont and by Christiana.

We will introduce testimony and schedules showing these losses. They are not fanciful.

Another subject I would like to discuss, under this decree proposed by du Pont, and consented to by Christiana and Delaware, the vote on the General Motors shares is passed to the ultimate stockholders of the three companies.

That would seem to meet the evil at which the Clayton Act is aimed. It removes any chance of du Pont or Chris-[fol. 72] tiana and Delaware exercising a vote to influence the managament of General Motors.

But, the Government objects. It says, oh, no, when that vote gets passed back to the ultimate stockholders, it will end up in groups of people who will get together and whose power when they get together, the power of their vote will be sufficient to influence General Motors.

Now, how does the Government get any basis for that contention? It gets it by some fanciful figures.

It first talks about a finding of this Court that Christiana and Delaware did control the managament of du Pont. But controlling the management of du Pont is not controlling General Motors. It is quite a different issue when the stock of General Motors is passed through to the ultimate stockholders of the three companies.

So it starts on a false premise. Then what do they do? They did it again in the brief that they filed in opposition to our motion just recently.

They took up a list of stockholders of du Pont, which we furnished them, and from it they say there are 599 stockholders having 67 per cent of the vote in du Pont. Again it is du Pont, not General Motors. They say 132 have 57 per cent of the vote in du Pont; and 34 have 46.6 per cent of the vote in du Pont.

Well, now, that can be done in almost any company—get the list, pick out all the big holdings, add them up, and say there are only five hundred people there, and, look, they have 50 or 60 per cent of the vote. That can't be done indiscriminately.

Let me show you who some of the people are that are [fol. 73] listed in this 599, in this 132, and in this 34. They aren't even individuals at all. There is no showing that they are even representing one person. They are bank nominees, for the most part.

Here you have Anderson & Co., nominee for the Fidelity-Philadelphia Trust Co., 202,000 shares.

Benjamin, Morgan & James, nominee for Scranton Lackawanna Trust Co., 75,000 shares.

Credit Suisse, 68,000 shares.

What is the showing they are going to vote with anybody else in this picture?

Cross & Co., nominee for the First Pennsylvania Co., 65,000 shares.

Cudd & Co., nominee for The Chase Manhattan Bank, 96,000 shares. It is very likely the bank doesn't even vote the shares, but passes the proxies along to the people whose stock they hold in custody.

I could go on for case after case. There is simply no justification for it.

What else does the Government say about aggregating

shares and about how much, what per cent would control General Motors?

Well, in the brief they filed last fall, September 26, they were driven to the position that one per cent of the vote in General Motors could control General Motors. That is a perfectly absurd position. There is no Federal statute which has a test of control lower than ten per cent, and there is no case on the subject of control which we can find which goes below seven per cent.

[fol. 74] Now, what are the facts that we are going to show?

We, of course, are going to put in schedules to show what the real situation is in connection with these groupings contended for by the Government.

We are going to show that if you take all the stockholders of Delaware and all their interests, not only through Delaware but through Christiana and du Pont and General Motors direct, excluding charities and educational institutions, they would have on a vote-pass-through, 3.75 per cent only of the General Motors vote.

Take another grouping. In this case, in the amended complaint, the Government had a grouping they called the du Pont family, and they were the families of Pierre du Pont and his seven brothers and sisters, and they finally called that the du Pont family.

Now, if you take that aggregation and the vote is passed through, they will have but 3.95 per cent of the General Motors vote.

Let us take another aggregation. Take the same du Pont family as defined in the amended complaint, and add on the family of A. Felix du Pont, because they have been active in Christiana, so let's assume they could be aggregated in, and it is only 4.3 per cent of the vote in General Motors.

Finally, I just give one more, if you take the vote in Christiana and Delaware, their total vote, and don't separate out anybody, take the total vote Christiana and Delaware would have, that is only 6.75 per cent of General [fol. 75] Motors; and I say even Christiana and Delaware could not control General Motors with that vote.

In conclusion, I would just like to say one or two more things.

I think the Government in proposing sales of this vast amount of stock should be very specific as to how it is going to be sold to show that it is practical.

Are they going to have a syndicate lasting ten years, or is it going to be a new syndicate every year?

Suppose it is a flop, as they say in the street, one year?

Is that going to help the syndicates that come after it, and the year's sales that come after it?

Who is going to be in those syndicates? What financial power have those people?

I think perhaps they ought to give us some assurance that the new Grand Jury proceeding against General Motors isn't going to interfere with the sales of this stock on the market.

Mr. Metzger or Mr. Reycraft said that we had a lot of plans around in the drawer somewhere and under the table, and why didn't we come up with them? That is, plans to solve this thing.

I can assure Mr. Reycraft and Mr. Metzger we have no plan other than the du Pont plan. We think it is a good plan, and we think this is a serious enough situation, and the time has come when the Government should get very serious and discuss a plan which is legally issuable by this court, and not a plan which this court has no power to issue and which they have no right to ask this court to issue. I [fol. 76] think we ought to get down to brass tacks right now.

I will say this, we have cooperated in getting the du Pont plan out by consenting to passing our vote along, and we will continue to cooperate to get a nondestructive fair plan thru in this court.

Opening Statement on Behalf of General Motors Corporation

By Mr. Tierney:

May it please the Court, I would like to make a brief statement in behalf of General Motors Corporation.

Although General Motors Corporation is not a defendant in this proceeding, it is, nevertheless, vitally interested in the judgment which your Honor will render, because that judgment could do immeasurable injury to General Motors and its nearly 800,000 shareholders.

Because General Motors is not a defendant, it has submitted no plan and has espoused none of those which have been filed by the other parties.

We are here, your Honor, as counsel for General Motors, to do all we can to aid the Court in forming a judgment in conformity with the opinion and mandate of the Supreme Court, a judgment which will at the same time do the least possible injury to General Motors and to its stockholders.

To that end, and with your Honor's permission, we intend to examine and cross examine witnesses, adduce evidence, make suggestions and objections and arguments, and to so conduct ourselves as to be of assistance to your Honor and at the same time represent our client.

[fol. 77] At the appropriate time, we will be prepared to argue and submit briefs with respect to our position that no judgment is permissible against General Motors corporation, and that a decree of divestiture is neither required by law nor intended by the decision of the Supreme Court.

We deem the proper time for such a presentation to be when all of the evidence is in and the Court is confronted with the duty of making appropriate findings and conclusions of law.

The decree which the Government has proposed threatens serious and certain financial injury to General Motors and to its stockholders. That serious threat of injury accounts for General Motors' intense interest in this proceeding.

General Motors has not violated the law. Its thousands of stockholders are mere innocent bystanders, and accordingly we will steadfastly oppose the entry of the Government's proposed decree and the entry of any decree which is likely to injure General Motors or its stockholders.

The Government decree requires du Pont to dispose of its 63 million shares of General Motors stock. This, we contend, would indubitably and unnecessarily penalize General Motors and its stockholders.

Our objections to the Government's proposal appear in our printed document filed here. It is in the green cover.

I would at this time, however, your Honor, briefly review a few of those objections.

General Motors objects to the provision of the Government's proposed judgment which in terms and effect require a forced sale and distribution,

[fol. 78] And I emphasize the words "forced sale and distribution" of a tremendous volume of General Motors stock for the reason that such forced sales and distribution would cause an unusual and an extraordinary impact on the normal market for General Motors stock and would inevitably result in immediate and continuing substantial decline in its market value.

Moreover, those losses in market value of General Motors stock would be inflicted upon nearly eight hundred thousand stockholders of General Motors, including hundreds of thousands of individuals and thousands more of trusts, estates, custodians for minors, churches, charitable organizations, insurance companies, university endowment funds, employee welfare funds, and the like. A half a million or more of those stockholders own less than two hundred shares apiece, and it is to be noted that General Motors has the second largest number of stockholders of all American corporations, exceeded only by American Telephone and Telegraph.

Yet, your Honor, under this decree all of these General Motors, stockholders, large and small, would be severely penalized by the Government decree, merely because just one of those stockholders, du Pont, has been found guilty of a violation of Section 7 of the Clayton Act.

In addition to that very real and direct loss which the stockholders of General Motors would suffer in the value of their stock, there will be another loss equally real, which will be suffered because of the fact that during the 10-year period of divestiture, while those tremendous volumes of General Motors stock hang over the market, General Motors [fol. 79] will find it possible to raise equity capital only at an excessive cost to the company and to its stockholders.

The 63 million shares of General Motors stock which du Pont owns have a value at current prices of almost three billion dollars. Under the Government's proposed judgment, one-tenth of those 63 million shares, with a value of 300 million dollars, is to be disposed of each year over a period of ten years.

It is quite obvious that it would be most difficult and costly to market an additional supply of General Motors stock to obtain our capital in the 10-year period during

which 63 million shares would hang over the market for sale and distribution under the Government's proposed judgment.

Your Honor, General Motors also objects to the provisions of the decree which the Government has asked your Honor to enter, which would directly order General Motors to do or refrain from doing certain things.

There is no justification for those provisions, either in law or in fact. Mr. Dallstream recognized that fact in his brief, where, while suggesting certain provisions running against General Motors—unnecessarily, we think—he pointed out that such provisions would be improper unless consented to by General Motors.

The Government, however, has made no such concessions.

At the conclusion of the original trial in this case, your Honor, you held that none of the parties had violated the law. Thereupon, an order was entered which dismissed this case as to all parties, including General Motors Corporation. As to General Motors, that order remains unreversed and unmodified. The Government appealed from the dismissal, but was successful only with respect to one [fol. 80] small part of its original case. The Government prevailed only in its charge that du Pont had violated Section 7 of the Clayton Act, which prohibits corporations from acquiring stock in other corporations under certain circumstances specifically set forth in the statute.

It is important to remember the rather obvious fact that only the acquiring corporation, in this case du Pont, can violate the statute.

General Motors, whose stock was acquired, did not and could not violate Section 7.

This fact has been recognized by Mr. Reycraft in his brief recently filed, in which he likened General Motors to a victim of the violation.

Your Honor, because General Motors is not a law violator, no decree can be entered ordering them to do or refrain from doing anything. Therefore, those portions of the Government's proposed decree which run directly against General Motors are clearly objectionable.

Examples are Section 12 of that proposed decree, which would grant visitorial powers to representatives of the

Department of Justice; Section 10, which would require General Motors to dismiss officers or directors under certain circumstances; and Section 11, which would require General Motors to cancel certain contracts.

Other provisions may be found in Sections 4 and 5.

General Motors has also, your Honor, a few other specific objections to the Government's proposal. For example, there is no need to vacate the entire dismissal order of [fol. 81] December 9, 1954, as Section 1 would do; for the dismissal should stand as to the defendants other than du Pont.

Nor is there need to sterilize the voting rights of nineteen million General Motors shares held by du Pont and allocable to Christiana and Delaware and to stockholders of Delaware; but that is, apparently, what Section 5 of the Government's proposed judgment would do.

The General Motors objections, your Honor, are set forth in detail in the document to which I have referred, and which we have filed herein. With your Honor's permission, we will participate in these proceedings and, when our turn comes, we will offer evidence and argument in support of our position.

I thank you.

The Court: Does anyone else wish to be heard?

If not, you may proceed with the evidence.

Mr. Reycraft: If your Honor please, we have proceeded on the assumption that the day would be taken up with opening statements and with argument on the motion. We have witnesses who have come from a long distance, and we asked that they appear in the morning.

[fols. 82-83] With your Honor's permission, we would respectfully request to adjourn at this time until tomorrow morning.

The Court: Under those circumstances, there is nothing else that the Court can do.

Mr. Reycraft: Thank you, your Honor.

(Whereupon an adjournment was taken in the above-entitled cause, to Tuesday, February 17, 1959, at 10:00 o'clock, a.m.)

[fol. 84]

Transcript of Proceedings of February 17, 1959

The Court: You may proceed.

Mr. Reycraft: If the Court please, we would like to call Mr. John J. Scanlon.

JOHN J. SCANLON, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Metzger:

Q. Will you state your name, and home address, sir?

A. My name is John J. Scanlon. I live in Fairfield, Connecticut.

Q. Where are you employed, sir?

A. I am Treasurer of the American Telephone & Telegraph Company.

Q. Could you outline your professional experience?

A. I have been with the Bell System Companies all of my business life, having served in accounting and financing jobs in the Bell Telephone Companies of Pennsylvania and Philadelphia, and more recently in the American Telephone & Telegraph Company.

Q. How long have you been Treasurer of the American Telephone & Telegraph Company?

A. Since 1953.

Q. Now you have stated that you have been in the Bell Telephone System, sir. Would you explain for the Court the nature of the organization of American Telephone & Telegraph and its subsidiaries?

A. The Bell System is a term applied to a group of companies comprised of the American Telephone & Telegraph Company, the parent, and some twenty operating subsidiary companies,—the Western Electric Company, the manufacturing source of the System, and the Bell Telephone Lab-

[fol. 85] oratories, the research arm of the System.

Q. In your capacity as Treasurer of AT&T, sir, are you familiar with the methods whereby Bell Telephone System has financed its growth between 1946 and to date?

A. I am.

Q. Would you explain in general terms the extent and the manner of such financing?

Mr. Tierney: If the Court please, we object to this witness testifying with respect to the financing by AT&T, because it is an attempt to have your Honor draw an unwarranted inference from comparing things that are not alike.

Mr. Metzger: If the Court please——

Mr. Tierney: Just a minute. Obviously, the sale and distribution of convertible debentures which AT&T has resorted to, has not the least bearing on the forced sale and distribution of 63 million shares of General Motors common stock by du Pont which it owns, as proposed by the Government's decree. It is just like comparing apples and oranges. We object to it.

Mr. Metzger: Sir, I believe that the proper inferences to be drawn from the testimony of this witness should be drawn by the Court after the witness has demonstrated what the facts are.

The Court: I haven't heard any testimony as yet, so whether it is relevant or not, I couldn't say this at time; so the Court will overrule the objection.

By Mr. Metzger:

Q. Will you explain, sir, in general terms, the extent and [fol. 86] the manner of such financing?

A. The Bell System, as a whole, has raised some 12 billion dollars of new capital in the post-war period.

Q. Sir, I notice that you are reading from notes. Were these notes prepared by you or under your supervision?

A. The notes I have are an excerpt from a letter which I wrote to the Antitrust Division, at its request.

Q. Do they reflect the facts of such financing accurately?

A. Yes. These appear to be a proper copy of my material.

Q. Thank you, sir.

Mr. Cox: May it please the Court, may I inquire of Mr. Metzger if that is the letter of January 6th——

Mr. Metzger: Yes.

Mr. Cox: This is the letter which the witness is using the excerpt from, is it?

Mr. Bushby: Why don't we have the letter marked in evidence?

Mr. Metzger: If you wish to do so, sir, very well.

Mr. Bushby: I think it would be helpful to everybody.

Mr. Metzger: Very well, although I don't see the relevance of much of it.

By Mr. Metzger:

Q. Will you continue, sir?

A. Yes, sir. The System has raised some 12 billion dollars of capital in total in the post-war period. That is made up of some 4.8 billion of debt, of which 1.9 billion was put on the parent company and some 2.9 billion on the operating subsidiaries. The remainder is made up of equity capital, the principal component of which has been the proceeds from the sale of AT&T Company convertible [fol. 87] debentures. The face amount of 3.9 billion, together with conversion premiums at 1.6 billion, produced a total of 5.5 billion from that source.

The AT&T Company had one stock right offering to its share owners in this period, producing, roughly, .6 billion; and it has also obtained through the sale of stock to employees under the Employees Stock Plan some .9 billion in that same period; and there is a minor item representing the proceeds from the minority portion of equity issued by certain of the subsidiaries, accounting for .2 billion.

All told, that makes it 12.0 billion.

Q. What portion of that was equity financing, sir?

A. About 7.2 billion out of the 12.

Q. You have stated, sir, that American Telephone & Telegraph has directly obtained 1.9 billion dollars in debt financing. Would you tell us, sir, the nature and the types of financing utilized here?

A. These have been straight debt issues, debentures, sold to underwriters, through competitive bidding.

Q. You have stated that another 2.9 billion dollars in debt offerings have been made by your operating companies. In what different way or ways, if any, have these offerings been presented?

A. Substantially in the same fashion as the American company offerings, differing largely as to size. The operating companys' offerings would be somewhat smaller individually.

Q. Are these debt offerings of the same type of a debt security——

A. As the convertible debentures?

Q. No. Are all of these debt offerings that have been made within this past eleven and a fraction years of the [fol. 88] same type of debt offering? That is, are they all mortgages, or are they all bonds?

A. No. A few of the subsidiaries employ mortgage bonds. Most of them employ straight debentures. They differ in that some of the subsidiaries carry Triple A ratings and some Double A ratings; otherwise the issues are substantially the same.

Q. Have these different types of offerings affected the price you have had to pay or, phrased differently, the interest rate on these certificates of indebtedness?

A. You are now addressing yourself solely to the straight debt offerings?

Q. Yes, sir.

A. What we have had to pay is what the market demanded at any time.

Q. Did you receive any better rate for mortgage than for a straight certificate of indebtedness?

A. Typically, a mortgage issue can be sold at a slightly lower cost than a straight debenture issue would be, so to that extent the companies who have employed mortgages may have obtained slightly lower costs on their issues.

Q. These debt issues of 4.8 billion——

A. In total, yes.

Q. (Continuing)—occurred during a period in which you were raising an additional 7.2 billion dollars in equity financing, is that correct?

A. That is correct.

Q. What effect, if any, did these equity issues have upon your debt financing?

A. In my opinion, comparatively little.

Q. Why would that be, sir?

A. I think the markets are more or less discrete markets. In the case of our debt issues, we are selling in the main to institutional buyers, to pension funds, and the like, while our convertible debenture issues have been aimed primarily to our share owners and investors like that.

[fol. 89] Q. So that the class of buyer of different types of securities is substantially different enough to account for a different market?

A. Substantially. There is of course some overlap, but not a significant amount.

Q. Returning to the price paid for debt financing, sir, without referring to specific figures, can you give us some sort of idea of the scale of interest rates that you did have to pay in order to secure these loans—debts?

A. Yes. They were governed entirely by going levels of interest rates; and in the period under discussion, I think we have sold issues at as low as a 2⅜ cost, and as high as something in excess of five per cent.

Q. You say "a going rate," sir. Are there any comparable issues that you might say that they are going rates with relation to?

A. The most nearly comparable perhaps would be the issues of the electric utilities, high grade electric utilities.

Q. And there would be some rough comparison with what you might have to pay and with what they might have to pay for the same type of financing?

A. Rough one, yes; but it is very difficult to establish perfect comparability between issues.

Q. Other than convertible debentures and stock rights offerings, which we will discuss later, what other methods of securing or raising equity capital have been utilized by AT&T?

Mr. Tierney: What was that question, now?

(Question read)

The Court: You may answer.

By the Witness:

A. There were two other sources enumerated in my earlier answer. The first is the Employees' Stock Plan. [fol. 90] We had made a number of offerings to employees

under three separate authorizations by the share owners of stock for purchase on an installment basis at a discount from the current market which qualifies the offer as a restricted stock offer under the Internal Revenue Code.

In the aggregate, we have raised about .9 billion dollars of equity capital from that source over the postwar years.

Some of our subsidiaries have minority amounts of stock in the hands of the public, and when they make stock offers on occasion, of course, rights accrue to these minority share owners, too.

Exercise of those rights by the minority share owners has produced over this entire period about .2 billion dollars.

By Mr. Metzger:

Q. Turning now to stock of American Telephone & Telegraph, could you tell us the number of shares outstanding as of December 31st, 1945, the beginning of this period under discussion?

A. Roughly, something over 20 million shares.

Q. What were the number of shareholders at that time, sir?

A. Something under 700,000 shareholders.

Q. And what was the number of shares outstanding as of December 31, 1958?

A. Approximately 70½ million.

The Court: How many?

The Witness: Seventy and one-half million; 70,500,000.

By Mr. Metzger:

Q. What were the number of shareholders at that time, sir?

A. Somewhat in excess of 1,600,000.

[fol. 91] Q. If my mathematics is correct, that is an increase of some 900,000 in shareholders?

A. Correct.

Q. And about 50 million in shares outstanding?

A. Correct.

Q. What portion of this 50 million increase in shares outstanding is attributable to equity financing in one form or another?

A. All of it—unless I misjudge your question, there could be no other.

Q. There could be no stock rights——

A. No stock dividends.

Q. No stock dividends or splits of any kind?

A. No splits.

Q. Sir, including all types of holders, could you tell us as of any given date the name and stockholding of your largest single stockholder?

A. We are required to publish at the end of each year the names of the 30 largest holders in our reports to the Federal Communications Commission.

The last report so made was that as of December 31, 1957. Merrill, Lynch, Pierce, Fenner & Beane, I believe it was then, were reported as the largest holder. Their holding at that time, if I recall it correctly, was something under 600,000 shares.

Q. Do you have any indication as to whether this stock was held by Merrill Lynch beneficially or as a nominee?

A. We believe primarily as a nominee. Requests from that firm for proxy material and dividend enclosures to be mailed to the beneficial holders would indicate that their stock is held for the account of some 15,000 customers.

Q. What would then be your estimate of the largest single beneficial holding of your stock?

[fol. 92] A. Among the largest holders, there are primarily nominees, bank nominees and the like. The largest that might be regarded as a single entity would be that of one of the large insurance companies which at the same date held some 96,000 shares.

Q. I believe that is slightly more than one-tenth of one per cent of outstanding equities?

A. Yes.

Q. And in the same terms, what is the largest block of stock held by an individual, in terms of percentage of outstanding shares?

A. I can give you only an approximation of that. I think the largest holding is in the neighborhood of 15,000 shares.

Q. Which would be about a thirtieth of one per cent?

A. Less than one-thirtieth of one per cent.

Q. What is the average holding per account, sir?

A. The average holding per account is approximately 43 shares. If you exclude the nominee, brokerage accounts, and the like, the average holding per individual account is about 36 shares.

Q. What percentage of the outstanding stock of American Telephone & Telegraph was held by share owners holding 100 shares or less?

A. Approximately half the stock.

Mr. Metzger: I offer for identification, this document, which I shall tentatively identify as Government's Exhibit 1.

Mr. Cowen: Is it understood that there is an objection to this entire line of testimony, without having the objection repeated to each and every question?

We intend to offer a motion to strike at the end of the witness' testimony.

The Court: Is the objection adopted by all defendants' counsel?

Mr. Cox: We will adopt that.

[fol. 93] The Court: If it is, the record may show a standing objection.

Mr. Scott: What is this document? May we see it?

The Court: Has this been exhibited to counsel?

Mr. Metzger: Copies are being passed out to them now, sir.

By Mr. Metzger:

Q. Mr. Scanlon, I show you this document——

The Court: The Court hasn't ruled yet.

Mr. Tierney: Did you offer this?

Mr. Metzger: I have offered it for identification.

The Court: All right, proceed.

By Mr. Metzger:

Q. Mr. Scanlon, I show you this document, and ask you if you are familiar with it.

A. It appears to be an attachment to the letter of January 6, I believe, that was referred to here earlier.

Mr. Bushby: Just a moment. The pencilled figures on there——

Mr. Metzger: I am going to cover that.

Mr. Bushby: Oh, you are going to fix that.

By Mr. Metzger:

Q. Was this document prepared by you or under your supervision?

A. It was.

Q. Does this apply to all the writing that appears on this document?

A. Not to the pencilled figures; just to the printed data.

Q. Are you prepared to attest to the accuracy of the printed portions of these tables?

A. Yes, sir.

[fol. 94] Q. I note, sir, that the printed portions of the chart do not state the number of shares outstanding at the time of any offering. May this be derived from the material contained in the printed portions of this chart?

A. Yes, it could.

Q. Would you explain how it could, sir?

A. Well, the chart shows the principal amount offered and the ratio of offer, and from those data the number of shares outstanding on the record date can be determined.

Mr. Metzger: Thank you, sir.

I offer into evidence this document entitled Government's Exhibit No. 1. The handwritten material on the bottom of the chart is derived from the printed portions by the mathematical computation just stated by Mr. Scanlon.

In accordance with the pretrial order, this need not be presented to the opposing party prior to offer, but is subject only to objection as to its arithmetical accuracy.

Mr. Bushby: If your Honor please, this is part of a larger document, which is the letter of January 6 from Mr. Scanlon to Judge Hansen in the antitrust division. I should think it should be tendered as a whole, and not just piecemeal. It is explained in the letter. It is all one document.

By Mr. Metzger:

Q. Mr. Scanlon, does this document speak for itself, sir?

Mr. Cowen: Your Honor, that is a leading question.

The Court: Sustained; it calls for a conclusion.

[fol. 95] By Mr. Metzger:

Q. Mr. Scanlon, does this document——

The Court: Pardon me. Do you adopt counsel's suggestion that the letter should be included?

Mr. Metzger: Sir, when counsel raised this objection before, I stated that if counsel wished to include this document himself as an exhibit, that I would not interpose any objection at that time.

Mr. Bushby: I think part of a document should not be offered, and I would hope that Government counsel would offer the whole thing, to which I would interpose no objection then.

The Court: I haven't seen it, so I have no opinion yet.

Mr. Bushby: If your Honor please, this is the document.

The Court: Give it to the Clerk.

Mr. Metzger: If your Honor please, before you complete the reading of that, that document was a letter in response to a letter I had written and a discussion I had with Mr. Scanlon. There are many references within that letter to discussions between us and to answers to questions which I addressed to Mr. Scanlon.

If counsel feels that there is any material in that letter that would be of material advantage to him, I suggest that counsel can bring that out. They have the document. They are not being mistreated in any respect.

The Court: This is a lengthy communication and I do not want to hold up the trial to read it now, so the Court reserves its ruling.

Mr. Metzger: All right.

[fol. 96] By Mr. Metzger:

Q. Sir, this document you hold in your hand is entitled, "American Telephone & Telegraph Post War Convertible and Stock Offerings,"

Exclusive of employee restrictive stock options and minority stock offerings, does this document cover all equity offerings between November 8, 1946 and January 24, 1958?

A. It does.

Q. Mr. Scanlon, I note that as to certain of the issues listed on this table, differing rates of conversion are listed. Would it be generally accurate to select the median conversion rate in order to ascertain generally the funds accruing to the company from such conversion?

A. I doubt if that would give you a really accurate answer. There are two issues where the conversion price is stepped down. They were stepped down under a dilution formula and without access to my records of conversions by annual periods I would have a little difficulty now in making a judgment on this score.

Q. Within two or three million dollars a median figure could be properly calculated?

A. These issues contemplated—the first one, for example, a total of nearly $500,000,000, so two or three million would not be quite accurate. I would have to say maybe $25 million would be the figure.

There is another offer here, the 1949 offer, where you note that the conversion price stepped up from 130 to 140, and that is a device that was used to force early conversion so that it would be wholly improper to use the 140 price at all in calculation of any price.

Q. As to the 1946 offering, what would you say would [fol. 97] be the most accurate?

A. This would require a reference to the scale of conversions by time periods.

Q. I note that that document does contain a time period for each dollar figure on the scale?

A. This document shows the conversion prices in effect on different dates, but I would have to relate that to the bonds that were converted during these respective periods to get an average proceed.

Q. Would you care to make an estimate as to 1946, sir?

A. The best I could give you now would be to guess that your method might produce an answer within 25 million plus or minus of accuracy.

Q. In total or for each issue?

A. For each of the two issues where this method would be employed.

Q. All right, sir. As to 1949, could you make an estimate as to the most accurate figure?

A. Well, little, if any, of the 1949 issue was converted at the 140 price. It was comparatively small.

Q. So something around 131 would be it?

A. That would be the price, sir.

Q. Thank you. I note further, sir, that you list an average price of rights. Is this price for each right or for enough rights to purchase one share?

A. This is a price per individual right, and it is the average of the closing prices during the offering.

Q. So in order to ascertain the average price you would have to pay for rights per share, you would have to refer to the body of the document, to the number of rights given per share?

A. The ratio of offering would determine the number of rights required.

Q. Would it be a fairly accurate assumption, sir, to determine the amount paid for each right, to use the average [fol. 98] prices of those rights?

A. It would be a reasonable assumption.

Q. Taken as a whole, sir, what percentage of your convertible offerings have been taken up by the stockholders subscribing to their own rights?

A. Approximat[illegible] 50 per cent of the amount of offering has been subs[illegible]bed for by share owners of record.

Q. Does this app[illegible] to your rights offering, sir?

A. This applies to the eight convertible debenture offerings appearing on this table.

Q. And what percentage of your rights offering was taken up by stockholders subscribing to their own rights?

A. By rights offering, I presume you mean——

Q. Straight stock.

A. Straight stock offering. We estimate about 75 per cent of that offer was taken by share owners of record.

Q. Thank you, sir.

Mr. Scanlon, turning to each specific offering, would you outline for us the circumstances surrounding the 1946 offering to include any particular difficulties encountered?

A. I would have a difficult time outlining all of the problems for an offer like that.

Q. Just generally.

A. Generally speaking, the 1946 offering was made at the time of sharply declining stock market prices, and that affected the offering. It was some years before the greater part of that offering was fully converted.

The 1947 and 1949 offerings likewise were a little slow in becoming completely converted in contrast to the experience of more recent offerings. I don't think there is any other observation that need be made about these.

[fol. 99] Q. What of the stock offering in 1956?

A. You say what of it?

Q. Yes, did you encounter any particular difficulties in relation to that?

A. No, my principal recollection of that is the fact that unlike convertible debenture offerings, the rights sold by share owners who did not exercise their own rights, exerted more pressure on the market than the rights sold in convertible offerings, sir.

Q. Sir, do you recall the opening price, the price of AT&T stock on the date of the opening of this stock offering?

A. Generally. My recollection is that at the time the terms were set, the price was probably over 180, and that it went ex rights and ex dividend on the record day, and fell in the mid 170's, and then during the offering period it fell perhaps to a low of about 165.

Q. You would expect ex rights and ex dividends stock to go down to the extent that the rights and—

A. That would be independent of the market pressure, yes.

Q. So that when you speak of the decline, you are speaking of the decline after the ex rights and ex dividend date, whatever that price may have been?

A. That's right.

Q. And the price during and at the conclusion of this offering?

A. Well, I have in mind primarily the decline to the low point during the offering period which I believe is the conventional way of measuring pressure of new offers.

Q. This offering was open for about 50 days?

A. About 35 days is my recollection.

Q. 35 more days?

A. 35 days elapsed between the time rights were mailed and the time rights expired.

[fol. 100] Has the 1958 offering been completed as yet, or virtually so?

A. No, the convertible debentures are still outstanding to the extent of some $115 million, perhaps.

Q. Out of a total offering of—

A. Of $718 million.

Q. So it is more than three-quarters of the way?

A. Oh, yes.

Q. To sum up your statements as to the stock offerings, be it a direct offering or convertible, in the period of slightly more than eleven years you have disposed of about 50 million shares of stock for which the company received from all sources 7.2 billion dollars, is that right, sir?

A. That is correct.

Q. And in addition stockholders received an additional sum for the sale of their rights as to those stockholders who did not exercise their rights?

A. Those share owners who did not subscribe did have the proceeds from the sale of their rights, that is correct.

Q. And that figure might be reached fairly accurately by multiplying the amount of their average right value by the amount of rights not exercised?

A. Approximately.

Q. Does the American Telephone & Telegraph Company have a pension fund, sir?

A. The American Telephone & Telegraph Company has a pension fund and so too, do the subsidiary companies.

Q. In sum, then, what is the amount of money in these funds, at the present time?

A. At the end of 1958 the 32 funds had an aggregate of something in excess of 2.8 billion dollars.

Mr. Bushby: That is not money.

The Witness: You are correct.

[fol. 101] The book value of 2.8 million dollars, substantially all of which, of course, was invested in securities.

By Mr. Metzger:

Q. Is this fund growing at the present time, sir?

A. In 1958 the growth was about 200 million dollars.

Q. Do you anticipate—

A. Again you say "this fund". I emphasized that it was the 32 funds, yes.

Q. Do you anticipate that this rate of growth will change substantially in the foreseeable future?

A. My judgment would be that the growth in absolute terms would decline somewhat over the next five or ten years.

Q. Would you care to make an estimate of the extent of the decline?

A. Oh, I reached that judgment in contemplation of increases made recently in the pension levels. I haven't had an actuarial calculation made. It could go down, I should think to as low as 150 million dollars.

Q. Per year?

A. Per year.

Q. Prior to July of 1958 were any of your pension funds of the Bell System in equity?

A. Invested in equity securities?

Q. Yes, sir.

A. No.

Q. Subsequent to that date have any of the resources, any of the funds of your pension systems been invested in equities?

A. Yes. In July and August of 1958 most companies authorized the trustee to put up to ten per cent of the total funds in equity securities listed on the National Securities Exchanges.

Q. That would run about 280 million dollars at the present time?

A. Potentially that would have a limit of 280 million [fol. 102] dollars at the present time; perhaps a little more than that prospectively.

Q. Sir, I note that you were entering the field of equities at a time when the average interest to be received on equity funds was being passed by first class bonds and mortgages as far as what rate of return you could secure. Do you recognize that as a fact, sir?

A. I think you meant to use the term "yield" in equity funds.

Q. Yes.

A. Yes, yields on debt obligations somewhat tended to exceed those available in equities.

Q. Nonetheless the funds were authorized to go into equities to the extent of ten per cent of the outstanding funds?

A. That is correct.

Q. What reason might there be for so accepting the lesser yield of equities?

Mr. Cox: I object to the question, may it please the Court. I think the witness may be aked what his reasons were, if he made the decision.

The Court: Sustained.

By Mr. Metzger:

Q. Mr. Scanlon, what reasons would you adduce for reaching such conclusion if you had any participation in the decision?

A. Oh, I should think that any decision to go into equities would be in contemplation of the lang term effects, and the notion commonly accepted is that over a longer period the return realized on equity investment might well exceed that obtained from debt obligations.

Mr. Metzger: Thank you, Mr. Scanlon.

That is all I have for this witness, sir.

Mr. Cox: May it please the Court, before Mr. Metzger [fol. 103] concludes with direct examination, I wonder if he would be kind enough to tell us who did make the notes on Plaintiff's Exhibit 1 for identification.

The Court: You mean the handwriting?

Mr. Cox: The handwriting.

Mr. Metzger: That, sir, is my inimitable scrawl.

Mr. Cox: These are your notes?

Mr. Metzger: That's right.

Mr. Cox: Including the note in the left-hand corner?

Mr. Metzger: That's right.

Cross Examination.

By Mr. Bushby:

Q. Mr. Scanlon, before you appeared on the witness stand here you talked with Mr. Metzger about your testimony, the testimony you would give?

A. Yes, sir.

Q. And you also talked with me about the testimony you would give, is that correct?

A. Yes, sir.

Q. Who makes the decisions as to the purchases of stocks for your pension fund?

A. The responsibility for such decisions lies with the Board of Directors of the individual companies. They have delegated that to the trustee, so that currently the trustee makes the selections of equity investments.

Q. And what institution is the trustee for——

A. The Bankers' Trust Company of New York is trustee for all of the Bell System funds.

Q. What individuals in Bankers' Trust Company make the decisions or are in charge of these funds?

A. Oh, the three most prominently involved would be Messrs. Lieb, Hemminger and Farnum.

The Court: Will you keep your voice up?

[fol. 104] The Witness: Yes, sir.

The Court: I don't hear you very well.

The Witness: I am sorry, sir.

By Mr. Bushby:

Q. That is Byran Lieb, L-i-e-b?

A. Mr. Byran Lieb, L-i-e-b: Mr. Ralph Hemminger, and Mr. Farnum, F-a-r-n-u-m.

Q. Do you know what the policy of the Bankers' Trust Company is as to investments in the stock of any one company, how much money they would put in the stock of any one company for these funds?

A. I don't know their precise policy, no.

Q. You would prefer not to speak as to what their policy is on that?

A. Yes, because I don't believe I could speak precisely for their judgment.

Q. Could you say this much: That in addition to the limitation of putting ten per cent of the total fund in equities, they have a policy of diversification even within the ten per cent?

A. I could say that assuredly. The trustee has repeatedly stated that diversification is one of his objectives.

Q. So that the full ten per cent is not, as a practical matter, available for investment in the stock of any one company?

A. As a practical matter, of course not; theoretically, perhaps yes.

Q. Turning now to the matter of your offerings of convertible debentures, and to the 1946 offering, in particular, on this schedule marked Government's Exhibit 1, what was the market price of the common stock of AT&T at the time the terms were set for the offering of those debentures? [fol. 105] A. My recollection is that it was in the—oh, somewhere in the hundred and eighties.

Q. Have you any notes or tabulations that would refresh your recollection on that, on those values, not only for that offering but for the other offerings on the schedule?

A. I am afraid not. I have with me here only the material that I sent to Mr. Metzger.

Mr. Bushby: I would like to have this marked for identification as Christiana Exhibit 1.

(Thereupon said document was marked Christiana Exhibit 1, for identification.)

Mr. Bushby: For the information of the Court and Counsel, it is simply a tabulation taken from the Commercial & Financial Chronicle of the prices of AT&T stock at the times of the offerings listed on the schedule marked Government's Exhibit 1.

By Mr. Bushby:

Q. Mr. Scanlon, does this tabultaion, Christiana Exhibit 1, refresh your recollection as to the approximate market price of AT&T common at the time the terms of the 1946 offering were set?

A. Yes. I would correct my earlier answer and adopt the figures shown here, which ranged from a low of 174 to a high of 176½ on that day. Earlier in 1946 the stock has sold as high as two hundred and a quarter.

Q. Now when you say "setting the terms of the offering", what does that consist of?

A. That is the day that the Board of Directors meet and approve the terms to be included in the material filed with the SEC.

Q. What are the essential terms of an offering of convertible debentures?

A. A maturity date, a coupon rate, and a conversion price.

Q. From the standpoint of the salability of the deben-[fol. 106] tures, what is the important feature? Is it the conversion price?

A. In the first instance, by far the most important element is the conversion price.

Q. And what consideration did you have in mind in setting the conversion price, which I read here as "150", in the case of the 1946 offering?

A. It is evident, of course, that I didn't participate in the establishment of the terms in 1946. I was not in New York at that time.

Q. You were not with AT&T?

A. I was not with the AT&T Company at that time.

Q. So that part of this tabulation is simply made up of material in your office, in which you did not personally participate?

A. That is correct, sir.

Q. Well, what is the first one of these issues in which you did participate?

A. The 1953 offer.

Q. Turning to Christiana Exhibit 1, does that exhibit refresh your recollection as to the price, market price, of AT&T common stock at the time you set the terms for the 1953 offering of convertible debentures?

A. It does.

Q. What was that price?

A. Approximately $156.

Q. And you participated in setting the terms for the 1953 offering, the principal term of which was the conversion price?

A. That is correct.

Q. And what consideration did you have in mind in fixing a conversion price of $136 at that time?

A. The principal considerations in these offers are: (1) A judgment as to how low the price of the stock might fall during the offering period; and (2) A determination that the debentures should sell at a price which will afford value to the rights. It is necessary to assure that the rights have [fol. 107] value in order to assure that the share owners will act upon them, either by subscribing or by selling.

Q. And you considered an important feature of favorable marketing, of successful marketing operations of equity securities, to be a body of stockholders who are given valuable rights by their company, is that correct?

A. I think that is an absolute essential in our convertible debenture financing.

Q. Do you also consider that essential in the case of sale of stock, as well?

A. The sale of stock through rights?

Q. That the feature of offering rights to a large body of stockholders is important in having a successful sale?

A. In our situation, it has been necessary, in our judgment, to see that the rights have substantial values in each offering.

Q. And where you set the conversion price of a convertible debenture issue, you set the offering price for a stock issue, you are not goverened by the desire to get the highest price obtainable, are you?

A. No, we have not been.

Q. Your desire is to see that the sock or the debentures are quickly sold in the market?

A. That is our objective.

And further, in the case of convertible debentures, our aim is to have them converted promptly.

Q. And the price is not important to you?

A. It is not wholly lacking in importance, but——

Q. But isn't it true that to the extent you reduce the price, your stockholders get the advantage of the reduction?

A. That is quite true. Since we market our offers through pre-emptive rights, the fact that the rights have value takes [fol. 108] nothing away from the share owners; it simply gives them what that sale otherwise would have.

Q. That is quite different from a situation where somebody other than the company is selling stock in a company, is that right?

A. Yes. A secondary offering, for example, would ordinarily have to be marketed at a discount from current quotations, if it were in any volume.

Q. And such an offering would not have the advantage of the issuance of rights to shareholders, isn't that correct?

A. Oh, no.

Q. Is there additional advantage to the piece of mechanics of having rights outstanding which help support a successful offering—something having to do with the margin requirements?

A. Well, in our convertible debenture offerings the roughly half of the offering that is not taken by the

share owners themselves is, in the main, absorbed by short-term investors, who employ bank credit to assume positions in the convertible debentures; because Regulation U permits the banks to lend on the debentures as though they were bonds, the position can be taken with a minimum of cash commitment and a position that would be tantamount to a position in the stock. The investors who subscribe for the bonds then sell them subsequently through the arbitrage market as demand for the stock occurs, so that the other half of the issue is floated onto the market pretty much about in tune with market demands for the stock.

Q. Now in a secondary stock offering, that is, an offering by someone who is not the issuer of the stock, there is no mechanics of rights, is that correct?

A. No, there could not be rights.

Q. Therefore, anyone wanting to buy that stock would [fol. 109] have to conform to the normal margin requirements, is that correct?

A. That is correct.

Q. Which are much higher than those applying to rights?

A. Currently they are 90 per cent, I believe.

Q. And what would the margin be that would be required on rights?

A. Banks will lend on 10 to 15 per cent, ordinarily, in a good convertible debenture offering.

Q. What will they lend on rights that relate to a stock offering by an issuer?

A. They will lend or they will require 25 per cent margin on subscriptions through the exercise of rights.

Q. As contrasted with 90 per cent on the stock.

A. Currently required yes.

Q. Is there another feature of an offering of convertible debentures which is a cushion or floor under you, as to the price at which those debentures might sink.

A. Yes. That is where the other two elements of pricing come into play; that is, the coupon and maturity. In the event that the price of the stock should fall drastically during the offering period, the coupon and maturity, in our issues, we would hope would be such as to afford the premium value on the bonds as bonds, and thereby maintain the value of rights.

Q. Do you mean by that that at that point insurance companies and banks would come into the market and purchase those debentures?

A. That is correct. That is, where the bonds would sell as bonds at a premium, still affording a value to rights and be attractive to commercial banks, insurance companies, pension funds, and the like.

Q. Now banks cannot buy your stock, is that correct?

A. By and large, no. That is right.

[fol. 110] Q. If they are members of the Federal Reserve System, they cannot buy your stock?

A. Not for their own accounts.

Q. Right. And you said before that the market for your stock was quite different than the market for your bonds. Do you mean by that that the insurance companies and similar institutions do not purchase your stocks in quantity?

A. Until very recently, of course the insurance companies bought little or no stock. Our bonds—and by this, we mean our straight debt issue—not the convertible bonds—are acquired, in the main, by pension funds, State and local funds, and the like.

Q. But that does not apply to your convertible debentures or to your stock?

A. No, sir.

Q. Is it your view, from your experience, that these equity offerings have depressed the price of AT&T stock against what it woud have been had the offerings not been made?

A. I think that one of the central characteristics of the Bell System situation in the postwar years has been is repeated need for additional capital, stemming from its very rapid rate of growth; so that I believe that investors must have taken into account the fact that the Bell System would be back repeatedly with additional offerings and with a consequence of a diluting effect on the earnings value of the stock. Concurrently with this need for repeated equity offerings has been the earnings situation, which is the other major term of stock price. In the early postwar years our earnings were relatively low, and it is only in recent years that they have come up into line with, say the electric utilities.

Q. The answer to my question is yes, it has had a depressing effect?

[fol. 111] Mr. Metzger. Your Honor, I object to that question.

The Court: The witness hasn't answered the question specifically.

Counsel asked him whether or not it had a depressing effect.

By the Witness:

A. I think that the overhang of repeated offerings has held the stock price down.

By Mr. Bushby:

Q. I would like to complete the record on one point, if I might, Mr. Scanlon. I think I had you testify as to the price of AT&T common only on two of the dates involved in the schedule here. Would you be willing to say that this refreshes your recollection as to price on October 15, 1957?

A. Yes.

Q. Would you that price?

A. Do you wish me to give it?

Q. If you would, yes.

A. On October 15, 1957, the price was approximately $156.

Q. Would you give the same for April 20, 1949?

A. Approximately $144.

Q. And the same for January 17, 1951?

A. About $152.

Q. The same for May 21, 1952? A. Slightly under $155.

Q. You have given 1953. Therefore, August 17, 1955.

A. About $182.

Q. July 18, 1956?

A. About $181.

Q. And January 15, 1958?

A. About $172.

[fol. 112] Q. Is it correct, Mr. Scanlon, that this tabulation being marked Government's Exhibit 1, is part of a more complete document, being a letter from you to Judge Hansen of January 6, 1959, and is subject to the explanations contained in that letter?

A. That is correct.

Mr. Bushby: I would therefore renew my objection to the introduction of the tabulation, unless accompanied by the explanation of the letter; but I have no objection to it as a complete document.

The Court: The Court will rule on the motion after it has had an opportunity of reading the letter.

Mr. Bushby: I understand, sir.

The Court: I don't want to delay the trial by taking the time to read it now.

Mr. Bushby: I understand, your Honor. I just wanted to show the connection.

By Mr. Bushby:

Q. Mr. Scanlon, how woud you rate the AT&T as against an industrial from the standpoint of equity offerings or for debt offerings?

A. I would think that ordinarily AT&T, being a less vicissitudinous business than most industrials, could market debt issues at somewhat lower cost. I believe the market record would show that.

As to the stock, as to the equity offerings again, I think, AT&T probably offers more in the way of stability of earnings than would the typical industrial company.

Q. Wouldn't you say, therefore, from the standpoint of a series of periodic offerings of equity stock, that AT&T would be in a more fortunate position than an industrial subject to great swings in its earnings and prospects? [fol. 113] A. Yes. I presume you mean there that the swings in price of the industrial equities would be greater in amplitude than would those of AT&T, and therefore any effort of repeated marketings would be more likely to catch the extremes of the swings.

The Court: If counsel will use the lectern, we will hear you better.

By Mr. Bushby:

Q. If AT&T Company had a very substantial stockholder which was required to make compulsory sales of that stock over a period of, say, ten years, as treasurer of AT&T, would you be apprenhensive as to the effect that might have on your ability to finance?

A. Yes, that would give me concern as to its effect on our ability to market stock directly.

Mr. Bushby: That is all.

The Court: Any further cross examination?

Redirect Examination.

By Metzger:

Q. Mr. Scanlon, in his cross examination, Mr. Bushby adverted particularly to the 1953 offering, and he pointed out that in setting up the price of conversion, reference was had to the spread between that price and the price of the stock on the market at that time, and this was beneficial to the shareholder, and that is why it was done, is that correct?

A. Yes.

Q. In this 1953 stock offering, sir, were all of the shares picked up by the shareholder who was given rights?

A. You mean referring to the 1953 convertible offering?

[fol. 114] Q. That is right, sir.

A. No. Approximately half of the issue was subscribed by shareholders of record as of the date of record.

Q. Who acquired the remaining 50 per cent of that?

A. The greater part of that was acquired by the short term investors to whom I have alluded previously, who employed bank credits.

Q. Did they convert these bonds and hold the AT&T stock thereafter?

A. In the main, no. In the main, they sold their bonds to arbitragers, who in turn sold the resultant stock to other investors who generally are similar to our present share owners or to the share owners themselves who were increasing their holdings.

Q. Did these other investors who ultimately received the stock of American Telephone & Telegraph receive it at any particular beneficial price under the market?

A. No, sir. They paid the going market.

Q. In other words, approximately 50 per cent of the 1953 offering was bought at market by people wishing to buy American Telephone & Telegraph stock?

A. Over a period of, say, a year and a half after the subscription.

Q. Would that also relate to the 1946 offering, sir?

A. In the 1946 offering, there was a period of some eight years required before we had the issue substantially converted.

Q. All right. Let's try 1947.

A. 1946, '47 and '49 were somewhat lower in conversion than the subsequent offers were.

Q. What percentage were converted by the shareholders who were exercising their own right?

A. In the earlier offerings?

[fol. 115] Q. Yes.

A. Something under 50 per cent in the earlier offerings.

Q. And in those offerings something over 50 per cent was ultimately taken into the hands of people paying the market price for American Telephone & Telegraph stock?

A. Essentially, yes.

Q. Could this be said of every convertible offering, essentially?

A. Essentially that must be because the convertible debentures and the stocks maintain a market parity. The convertible debentures and the stock price maintain a reasonable parity in the market.

Q. And 25 per cent of the rights offering was taken up, the stock rights offering was taken up by other than stockholders exercising their own rights, I believe you testified before?

A. That is correct. The difference there is that that 25 per cent was picked up in the main during the offering period, during the subscription perid.

Q. And what did they pay for the stock?

A. Substantially the going market price during that period. I believe there were present some speculative buying, taking advantage of this 25 per cent margin provision.

Q. Then you would say, sir, that approximately 20 million shares of American Telephone & Telegraph have been picked up, have been purchased, of newly issued stock over the period of these offerings at the market by investors other than those exercising their own rights?

A. That is a reasonable figure.

Q. Now, sir, Mr. Bushby adverted to the possibility that at some point during an offering the stock might fall drastically, and therefore you had several cushions?

A. Yes.

Q. Has the stock of AT&T ever fallen drastically in post [fol. 116] war years during the period of offering?

A. In the 1946 offer, yes.

Q. How far did it fall, sir?

A. During the offering period it got in the low 160's, I believe, and the high earlier in 1946 was slightly over 200, and the terms were set against the declining market.

Q. Sir, would you say that the effect of this offering was the circumstance that brought on this decline?

A. Not the single circumstance.

Q. Was it the major circumstance? A. I wouldn't really know, Mr. Metzger.

Q. Was not the period between the price of 200 and the 160 a period of sharply declining market prices on the market as a whole?

A. That was the case in the market at that time.

Q. Thank you, sir. Now in response to Mr. Bushby's questions you replied that the effect of these nine offerings over a period of eleven years has to some extent held your stock down in price, I believe. How much has it held the stock down in price?

A. I don't think I could quantify that, because, as I also noted in my answer to Mr. Bushby, I think our earnings levels concurrently during that period exerted an influence on the stock price.

Q. Which would you say has a higher impact on your stock prices, your earnings level and the dividend payout, or the fact that an offering was being made?

A. I would have difficulty assigning weights to those. I wouldn't minimize the effect of overhang, however.

Q. Then you are unable to assign any quantitative levels to your estimates that these nine offerings have to some extent held your stock down?

A. I confess freely my inability to do it. I would question anyone else's.

[fol. 117] Q. Now, sir, turning to the document labeled Government's Exhibit 1, would you look at that document, sir?

A. All right.

Q. In the left hand column you have a statement, "Year of Offering" followed across by the years cited. Under that you have a date on which the terms were set.

Is there anything in your letter of January 6, 1959 which would explain these dates?

A. I don't recall anything of that sort.

Q. Is there anything in your letter of January 6th which would explain the type of security, for example, 1947, you state convertible 2¾ 1957?

A. I think there is a considerable part of the letter devoted to why we used convertibles.

Q. But there is no explanatory statement as to the fact that it is convertible and it is 2¾ and it was 1957 callable?

A. No, I didn't repeat the same data in the letter.

Q. Could that be stated as to every item on this table, every printed item on this table? Is there any single item on this table which could not be referred to alone without reference to the letter, and get across the information you were attempting to supply?

A. The tabular data shown on the attachment or on your Exhibit No. 1 could stand by themselves, obviously.

I wouldn't adopt the last portion of your statement. I think you used the term "get across." I think there is considerable in the letter that modify and explain the table.

Q. Now, sir, can you give me an example of modification or explanation of any figure adduced here in the table?

A. Nothing in the letter would modify the figures, Mr. Metzger.

[fol. 118] Mr. Metzger: Thank you, sir.

The Court: Any recross?

Mr. Bushby. Yes, I would like to ask one or two questions only.

Recross-examination.

By Mr. Bushby:

Q. You were asked about how much of these issues was taken up by the shareholders of record, and I believe your answer was something in the neighborhood of 50 per cent?

A. That is correct.

Q. In the case of the stock issues, one stock issue, it was something in the neighborhood of 75 per cent?

A. That is correct.

Q. Now, the balance of the issue in the case of the convertibles and also in the case of the stock issue was taken up by people who were not the original share owners but by people who had bought rights from the original share owners, is that correct?

A. That is correct.

Q. So therefore those people paid not only the subscription price, but they also had to pay for the rights?

A. That is correct.

Q. In the case of the stock rights in the 1956 stock offering, the average price was around $6.93 a right?

A. That is correct.

Q. And it took ten of those before you could buy one share of stock?

A. That is right.

Q. So any one of these people who bought a share of stock at subscription price also had to lay out $69.00 a share?

A. So that they paid substantially the market price for the stock.

[fol. 119] Q. $69.00, plus $100.00 subscription price?

A. That is correct.

Q. Now in the case of a secondary offering, there are no such mechanics as rights, is that correct?

A. That is right.

Q. In the case of a secondary offering, the offering has to be made with regard to getting the highest price that can be obtained, is that correct?

A. That is the usual objective, yes.

Q. Whereas on an offering by an issuer, that is not the primary objective?

A. It is not of the same significance, because an offering by an issuer through pre-emptive rights does no harm to the share owner.

Q. Even if the price is low?

A. Even if the price is low.

Mr. Bushby: That is all I have.

The Court: Is there anything further of this witness?

Mr. Cox: May it please the Court, I don't wish to weary the Court with an argument on the entirety of these two documents, but I do think the attention of the Court and the

attention of Mr. Metzger should be called to a provision in the pretrial order.

Paragraph 5 reads as follows:

> "All parties and the Amicus Curiae may offer part of a document by way of an expert. If any party or either Amicus Curiae objects to the offer on the grounds that all of the documents or more than the excerpt should be offered, the offering party shall, without debate, offer the entire document or such additional portions as may be specified in the objection, and the objecting party may at that time read the additional portions offered."

[fol. 120] It seems to me, if it please the Court, unless I misunderstand the provision, it is rather conclusive.

The Court: I think the testimony of this witness settles the debate.

Mr. Metzger: May I speak to that, sir?

The Court: Yes.

Mr. Metzger: This I have attested is the document prepared by the witness. However, at no point has the Government objected to the defendants offering the letter. We have said if they wish to offer it at any time, they may do so.

The Court: In view of the witness's testimony, the Court is of the opinion that the letter of January 6, 1959, to Mr. Hansen is related to Exhibit 1, and they both should be received in evidence, and that is the ruling.

(Said document, so offered and received in evidence, was marked Government's Exhibit 1.)

The Court: The Court now stands recessed for ten mintues.

(A short recess was thereupon had.)

The Court: Proceed.

Mr. Metzger: The Government calls as its next witness, Edward G. Kinloch.

EDWARD G. KINLOCH, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Metzger:

Q. Mr. Kinloch, would you state your name and address, [fol. 121] please?

A. Edward G. Kinloch, 1 Glen Eagle Drive, Larchmont, New York.

Q. Where are you employed, sir?

A. I am employed by the General Electric Company, at 57 Lexington Avenue, New York City.

Q. And your functions?

A. I am Manager of the Trust Investment Operations Department of the company.

Q. Will you state for the Court your professional qualifications?

A. I started with General Electric about twenty-six years ago, and I have been in the financial end of the business; that is the investment end of the business since that time.

Mr. Tierney: Will you keep your voice up?

The Court: Yes, speak louder, we don't hear you.

The Witness: I am sorry.

Mr. Metzger: The Government would like to mark for identification Government's Exhibit No. 2.

(Thereupon said document was marked Government's Exhibit 2, for identification.)

By Mr. Metzger:

Q. I ask you, do you have a copy of this document?

A. I do.

Q. This document is entitled, "General Electric Pension Trust 1946-1958". Was this prepared by you, sir, or under your supervision?

A. It was.

Q. Could you attest to its general accuracy?

A. I can.

Q. Will you explain, sir, the meaning of each of the items A through E?

A. Yes. "A", the assets or book value in the Pension Fund represents just that. That is the dollars at cost of assets from year to year.

[fol. 122] Q. In thousands of dollars?

A. In thousands of dollars.

Q. And the difference between 1946 and '47—

A. Represents the increase in 1947.

Q. And item "D" then would reflect the same things for market value, would it not?

A. Item "D"?

Q. Yes.

A. That is correct.

Q. Item "B", sir?

A. Item "B", on a cost basis, represents our holdings in equities of the General Electric Company, and the second item is for all other equity securities.

Q. I note the zero across the line for these, for General Electric, sir. Will you explain that?

A. It has been the policy of the trust not to invest in the equities of the General Electric Company.

Q. And item "C", sir?

A. Item "C" represents the contributions in thousands of dollars paid into the fund each year, by, first, employees, and secondly, by the company.

Q. Now, sir, I note that between the years 1946 and 1949 the General Electric Pension Trust is not listed as having had any equities, but in 1950 to have $10,101,000.00 worth. Will you explain why, sir, the fund went into equities, if you know of your own knowledge?

A. We made our first equity investment in 1950 after careful and long study in order to—you must remember that in 1950 bond yields were very low, and the idea of going into equities in 1950 was to get not only a better immediate rate of return from stocks, but also to share in the possibility of further growth in those dividends over a period of years.

Q. Has there been any change in that relationship between the rate of return of bonds versus stocks?

A. Yes, the rate of return on bonds relative to stocks [fol. 123] has—I should put it the other way, the relationship of stock yields to bond yields has gone down substantially in the last several years.

Q. Are you still buying equities, sir?

A. We are.

Q. At what rate?

A. At approximately 25 to 30 per cent of our growth each year.

Q. And what is that growth each year, sir?

A. The growth is running probably 75 to 80 million dollars a year.

Q. Is there any period of years or intermediary term that you could estimate that rate of growth would continue or decrease or increase?

A. No, there isn't. The actuarial studies that we have made, based on the present rate of employment, our growth should be, probably continue at about the present rate for maybe fifteen or twenty years more.

Q. Seventy-five to 80 million dollars?

A. In that area.

Q. You state, sir, that you are still buying equities at the rate of about 25 to 30 per cent of the increase each year, despite the fact that you are obtaining higher yields on bonds and mortgages. Of your own knowledge, sir, do you know why this policy is being followed?

A. Well, I should point out, Mr. Metzger, that while we are putting 25 or 30 per cent of our new money in equities today, that represents a substantial decline from the amount that we had put in equities back in 1955, for instance, and also in 1956.

Q. But you are continuing this policy despite the——

A. We are, sir.

Q. Do you know of your own knowledge why this is being continued despite the lower yield?

A. Because we expect that the eventual economic growth [fol. 124] of the country will prove beneficial to business in in general, which eventually will be reflected in better earnings in the companies that we are investing in.

Mr. Metzger: Thank you.

I offer this document in evidence as Government's Exhibit 2.

The Court: Has Counsel seen it?

Mr. Cox: Yes. We have no objection.

The Court: No objections. It is received.

(Said document, so offered and received in evidence, was marked Government's Exhibit 2.)

Mr. Metzger: That is the conclusion of my direct examination, sir.

Cross Examination.

By Mr. Horsky:

Q. Mr. Kinloch, first I would like to clarify one figure you gave apparently from this chart. You said you expected the average rate of growth of the fund to continue as it has in the past at a figure of about 80 or 85 million.

A. I think I said 75 to 80 million, Mr. Horsky.

Q. Perhaps I misunderstood, but do I correctly understand that Column C in this Government Exhibit 2 which shows the total contributions to the fund, is its actual growth in the sense we are talking about?

A. No, it is not. That is the major portion of the growth. But in addition to that, we have income from the fund over and above pension payments.

Q. I see. Which is not reflected on this chart?

A. Which is not shown on this chart.

Q. So the figure we are talking about is between 75 to 80 million dollars?

A. The overall growth can be taken in the difference between the figures in the first line.

[fol. 125] Q. Do you have at the moment—you are a member of the Board of Trustees of this pension fund, are you not?

A. I am.

Q. And you are also the manager?

A. That is correct.

Q. Do the Board of Trustees have at the moment a policy with respect to the amount of annual growth which they will invest in equities?

A. We do.

Q. Is it a ceiling, sir?

A. No, I really have no ceiling on it.

Q. I don't mean to be technical, but what is the policy?

A. Our policy in investing in equities, is to increase the rate of buying as we feel we have more favorable markets in which to do so.

Q. Do you have a range within which you purchase equities, then?

A. Yes, our working range right now normally would be anywhere from 25 per cent of new money to 85 per cent of new money.

Q. And what is it at the moment?

A. 25 per cent.

Q. And that reflects the low yield on equities at the present time?

A. That is right.

Q. Who determines what stocks you purchase for the Fund, Mr. Kinloch?

A. The stocks are first of all approved by the Board of Trustees and are added to an approved list. A committee of the Board consisting of two men who may operate between meetings of the Board with all of the powers of the Board, in effect makes the selection of those stocks.

Q. How many are there on the approved list, approximately?

A. About eighty-five.

Q. Does the Board of Trustees have a policy with respect to diversification among the stocks that it buys?

A. Yes, we do.

[fol. 126] Q. Can you tell me roughly what the percentage is that you would be investing in automotives?

A. At the present time, and I am speaking now only of the stock portion of the portfolio——

Q. That's right.

A. —our bogey is set at four per cent of our total stockholdings.

Q. Do you know, Mr. Kinloch, about what percentage of that four per cent would be represented by the stock of General Motors?

A. Oh, that probably runs close to half.

Q. About half of the four per cent?

A. A little less than half.

Q. Now, let me see if I do with you some arithmetic. If you have 80 million dollars of new money to invest each year, and you are investing at the present time 25 per cent of that in equities, that is 20 million, so you are investing

about four per cent of the 20 million in automotives, which would be about 800,000, and you are investing about half of that in General Motors, which would be about $400,000. Is that about right?

A. Yes, so far as arithmetic is concerned, it is.

Q. Have you, in fact, been purchasing General Motors at that rate in the last few years?

A. We have not. We don't in any one year purchase the exact amounts called for in the bogey. These so-called bogies are just something to work toward. We try to pick our securities at the times we consider them to have the best market value.

Q. Then I take it, it would not be proper to assume from the fact that you have $80 million to invest in the proportions that we have been talking about, to assume that you will buy General Motors in any figure in any future year? [fol. 127] That will depend on circumstances.

A. That is correct.

Q. Do you have with you, sir, the figures as to your purchases of General Motors in the past four or five years?

A. I do.

Q. Would you refer to them and tell the Court how many shares of General Motors stock you purchased in 1958?

A. Do you want that for the year of 1958?

Q. Yes.

A. We made no purchases of General Motors stock in 1958.

Q. What about 1957?

A. 3,000 shares.

Q. 1956?

A. 51,000 shares.

Q. 1955?

A. 22,900.

Q. And 1954?

A. 3,900.

Q. Could you tell the Court your total present holdings of General Motors stock?

A. 184,000 shares.

Q. While you have that paper before you, will you also give us the figures for your purchases of du Pont stock, 1958 to 1954, in the same way?

A. In 1958 no purchases; in 1957, 600; 1956, 14,100; 1955, 12,100; 1954, 1,900.

Q. And your total holdings, sir?

A. 51,200

Q. That means in 1958 you purchased no shares of either du Pont or General Motors?

A. That is correct.

Q. And that in 1957 your purchases were substantially lower than they had been in the previous year with respect to both stocks?

A. That is correct.

Q. Is it fair to assume, Mr. Kinloch, that the pendency of this litigation had something to do with that quantity of purchasing?

A. I would say to only a minor extent, Mr. Horsky. We made substantial purchases in 1955 and 1956, and they are largely in both of those companies. Beginning [fol. 128] in 1957 we felt that at the outlook for certain other industries, for certain other companies in the portfolio seemed to be better than it did for either the automobile or chemical industries; and, in view of our holdings we reduced our buying in 1957.

Q. Have you had any trouble, Mr. Kinloch, with purchasing any quantity of General Motors stock that you wanted at the market price?

A. No.

Q. I didn't hear the answer.

A. Never.

Q. If you knew, Mr. Kinloch, that between 19 and 20 million shares of General Motors stock were going to come on to the market in the course of the next ten years in more or less equal annual installments, what effects would that have on your attitude towards purchasing additional shares of General Motors for the pension fund?

A. I think we would be somewhat cautious. Whether or not we would make the purchases would depend on the market situation at the time.

Mr. Horsky: Thank you.

Mr. Metzger: No redirect, your Honor.

The Court: Is there further cross?

The witness is excused.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Reycraft: If your Honor please, I have a book of exhibits which I would like to refer to, and I have a separate one for the Court.

First, your Honor, I would like to refer to a series of exhibits which were obtained on the deposition of Mr. Sumner B. Emerson.

These documents have been stipulated to as to their authenticity, and they were identified under the pretrial order and there were no objections, as far as I know.

[fol. 129] Mr. Burnham: May we see which ones those are?

Mr. Reycraft: Your Honor, I would like to read from the deposition, if I may, with respect to Mr. Tierney's question:

"Q. (By Mr. Reycraft): Mr. Tierney, do I understand that you are willing to stipulate as to those documents which have been furnished to you, subject to the reservation which Mr. Cox stated?

"A. (Mr. Tierney): I think you understand correctly."

Do you have any observation, Mr. Tierney?

Mr. Tierney: I have none.

Mr. Reycraft: The first document, your Honor, has a heading "Registered secondary"—"200,000 shares"—"Aluminum Company of America"—"Common Stock, $1 par value."

The Government offers this document in evidence.

Mr. Cox: May I see it, please?

(Counsel examining document.)

The Court: Do you intend, Mr. Reycraft, to offer at this time all of the exhibits contained in this volume?

Mr. Reycraft: Yes, your Honor.

The Court: Well, I presume that counsel has seen them, and it would simplify matters a great deal if there are

objections to any of them, single them out, so the Court won't have to rule separately on each and every one of them. In other words, the Court will admit all that are not objected to.

Mr. Tierney: Your Honor, we would like to look at this book.

[fol. 130] The Court: You would like to look through it, yes.

Well, it is now 12:15. Suppose I recess at this time? I will give counsel an opportunity to check through this book and, if there are any objections, the Court will rule on them at two o'clock.

Mr. Burnham: The problem is, your Honor, we have two file drawers for exhibits that were produced at that time, and Mr. Reycraft has made a selection, and we don't know which ones he has selected.

Mr. Reycraft: I would like to say that on the pretrial order I did identify by number on the documents the ones we would offer, but I believe we can work it out.

Mr. Burnham: Mr. Reycraft, I don't like to differ with you, but I recall no such identification being received by us at any time under the pre-trial order.

The Court: Well, you will have an opportunity to check and make comparisons.

(Whereupon a recess was taken in the trial of the above-entitled cause until 2:00 o'clock of the same day, Tuesday, February 17, 1959.)

[fol. 131] Before Hon. Walter J. LaBuy, Tuesday, February 17, 1959, 2:00 o'clock p.m.

Proceedings resumed pursuant to adjournment.

Present: Same as before.

The Court: Counsel may proceed.

Mr. Andrews: I will call Mr. O'Leary.

JAMES J. O'LEARY, called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Andrews:

Q. Mr. O'Leary, could we have your name and address, please?

A. James J. O'Leary; Life Insurance Association of America, 488 Madison Avenue, New York City.

Q. Mr. O'Leary, would you tell us what your present position is with the Life Insurance of America?

A. I am director of economic research.

Q. Would you tell us what your duties encompass as director of economic research with that association.

A. My duties are to serve as economist for the Life Insurance Association, and in that regard for the life insurance business, and to administer what we call our investment research program, which generally speaking is a program of maintaining statistical information on the investment activities of life insurance companies.

[fol. 132] Q. Would you tell us how long you have been in that present position which you now have?

A. Since 1947.

Q. Mr. O'Leary, would you tell us briefly what your academic background has been?

A. I have a B.A. degree from Wesleyan University; M.A. degree from Wesleyan; Ph.D. from Duke University.

Q. Would you tell us what your fields of study or endeavor were?

A. Money and banking and finance.

Q. Do you belong to any professional societies or groups of any kind, Mr. O'Leary?

A. Yes, the American Economic Association, the American Statistical Association and the Southern Economic Association.

Q. As to these associations you have just named, do you hold any positions? Are you an officer of any of them?

A. I am president of the American Finance Association.

Q. Dr. O'Leary, have you ever made any studies as to the common stock purchases made by life insurance companies?

A. Yes, I have.

Q. Would you tell us what these studies have been?

A. There is one study in particular, which is the only one we have made of life insurance company purchases of stock, common stocks, and that was the study made for the period 1953 through 1956.

Q. Would you describe to us what these circumstances were under which you made this study that you have just named?

A. In 1955 a Mr. Achenstein, who was a member of the staff of the Senate, United States Senate Banking and Currency Committee, approached me and asked me whether I would aid the committee in obtaining information on common stock purchases of life insurance companies, and it was in this connection that we made the study.

[fol. 133] Q. Did you agree to so aid the committee?

A. We did.

Q. Would you describe the procedure that you used in preparing this study?

A. All of our procedures were conceived under the direction of the staff of the Senate Banking and Currency Committee. What we did was to comply with their requests for the type of information they desired. What we did was to send to twenty-five life insurance companies a survey, a questionnaire, asking for detailed information on their common stock purchases and sales in this period in question, which was the period from January, 1953 through September of 1955.

Q. I think you stated that you surveyed twenty-five companies. Would you tell us the reasons for choosing these particular twenty-five companies?

A. We were interested in getting a very substantial part of the life insurance business in the survey, and at the same time there were limitations that were given to us by the Senate Banking and Currency Committee as to time.

By inspection of the annual statements of the companies, we were able to determine that twenty-five life companies at the end of 1954 had 85 per cent of the common stock held by life insurance companies, and so we limited our survey

to those twenty-five companies, considering that this met the requests of the Senate Banking and Currency Committee for a picture of the life insurance business as a whole, even though fifteen per cent of the stock was held by other companies not surveyed.

Q. For this period, Dr. O'Leary, what did you find were the net purchases of common stock by these twenty-five companies that you have just described?

[fol. 134] Mr. Tierney: If it please the Court, I would like to make a general objection to this line of testimony.

It is wholly irrelevant and immaterial. Unless this witness is prepared to testify that life insurance companies would be willing to purchase General Motors stock, other than at a sacrifice price, if this Government proposed decree went into effect, it is wholly irrelevant how much money they have invested in common stocks.

It is wholly irrelevant as to how much money there is available to invest in common stocks. Unless somebody other than a statistician who is reporting what has happened in the past is willing to make a commitment, that there is some likelihood that insurance companies would be willing to buy stock with a cloud hanging over it, I think the whole line of testimony is wholly irrelevant.

The Court: You will have an opportunity to develop these matters by cross-examination. Objection overruled.

Mr. Andrews: I might add, by way of explanation, that I solicit this information as a matter of background. I intend to go into General Motors stock specifically.

Q. Dr. O'Leary, did you obtain separate information on purchases and sales of General Motors stock by these twenty-five companies that you have described during this period?

A. Yes, we did.

Q. What were the total purchases of General Motors stock for this period by these companies?

A. May I refer to a note in this connection?

[fol. 135] Q. Did you prepare these notes in connection with your testimony?

A. Yes.

Q. With your Honor's permission.

A. These are figures that are in the report that was made by the Senate Banking and Currency Committee in the period 1953 through——

The Court: Keep your voice up, please. I don't hear you.

By the Witness:

A. (Continuing)—in the period January, 1953, through September, 1955. The net purchases of General Motors stock, that is, net purchases, net after sales, in this period, amounted to 7.7 million dollars.

Q. Dr. O'Leary, would you tell us how much General Motors stock was sold by these companies for this same period?

A. $140,613 of the stock was sold. The gross purchases were 7.8 million.

Q. Do you have the net purchase figure?

A. The net purchase figure was the figure I gave you, 7.7 million.

Q. Dr. O'Leary, from your study, were you able to tell which stocks showed the largest amount of net purchases during this period by these twenty-five companies?

A. Yes.

Q. Would you tell us which stock this was?

A. General Motors.

Q. Dr. O'Leary, have you ever made a comparable study to this one that you just described for a period subsequent to September, 1955?

A. No. No, we have not.

Q. Have you ever made a comparable study prior to this period?

A. No.

Q. To your knowledge, have there been any other studies relating to purchases by insurance companies of common [fol. 136] stock comparable to this study that you have made?

A. There have not been.

Q. Were the results of this study ever published?

A. Yes they were published.

Q. Would you tell us what publication?

A. The publication was a Committee print in the Eighty-fourth Congress, Second Session, which was entitled, "Institutional Investors and the Stock Market, 1953-1955." This was a staff report to the Senate Banking and Currency Committee, and it was dated December 28, 1956.

Q. Dr. O'Leary, do your duties as Director of Economic Research in Investments—I think it was—of insurance companies, require that you be familiar with investments of insurance companies at the present time?

A. They require that I be generally familiar with the investments of life insurance companies—trends in life insurance investments.

Q. Dr. O'Leary, relying on your knowledge and familiarity that you have with the investment activities of insurance companies, do you have any reason to believe that General Motors stock is less satisfactory an investment, from the point of view of these insurance companies today, than it was in 1955?

A. I do not.

Mr. Andrews: I have no further questions, your Honor.

Cross-Examination.

By Mr. Bushby:

Q. Dr. O'Leary, you gave a figure of net purchases by life insurance companies in this period of January, 1953, through August or September, 1955, of some 7 million——

A. 7.7 million.

[fol. 137] Q. (Continuing)—million dollars?

A. Yes.

Q. And you didn't give a share figure?

A. I did not, no.

Q. Have you got the share figure?

A. I can get the share figure very promptly, if you would like it.

Q. I would like it.

A. Actually, I think I recall the figure on shares. It was 94,000 shares. I believe that was the figure on net.

If you would like. I will give you the exact figure.

That is, if somebody will do the arithmetic here. I am getting to the point where I need to have bifocals.

Let me see now—the net purchases of common stocks by shares in 1953—

I was wrong on shares, I am sorry.

Let's see—no. There are common stocks *in toto.*

I think I am right on that 94,000 shares. It is going to take me a little time to dig through this. If you want me to take the time, I will do it.

Q. No. Would you turn to, I believe, the same volume, page 255?

A. 255, all right.

Q. Which purports to show transactions by the 25 life companies in General Motors during the period you mentioned?

A. Yes.

Q. "Number of shares." Is that the correct number?

A. That is the correct number. The number of shares in 1953 was 15,500; and in 1954 it was 35,000. Is that right?

Q. Right.

A. And in the first nine months of 1955 it was 31,830.

Now what does that total up to?

[fol. 138] Q. I didn't write it down, but it can be computed readily. We have the figure now.

A. Yes.

Q. You say that in your business you are familiar with the investment policy of the life companies. Do the life companies favor investing in common stock?

A. Well—

Mr. Andrews: Your Honor, I think that is outside the scope of the direct and I object to it. We expect to go into this question by another witness.

The Court: Overruled.

The Witness: Would you repeat that question?

(Question read.)

By the Witness:

A. My answer to that would have to be no.

But may I explain the answer briefly?

By Mr. Bushby:

Q. Yes, certainly.

A. Which I think would be germane—and that is that life insurance companies are regulated by State law on what is a legal investment; and in the case of common stocks, most state statutes put a rather narrow limitation on the extent to which life insurance companies can purchase common stocks. For example, in New York life insurance companies domiciled in New York are limited to five per cent of assets or one-half of surplus, whichever is the lesser amount.

It is true that the life insurance business, generally, has up to this point not taken advantage of the limitations they have, and within that—

Q. Within the permissions they have.

A. Within the permissions that they have, and I would say that life insurance companies—the contracts, life insurance contracts are fixed dollar contracts, which makes life [fol. 139] insurance companies much likely, of course, historically to purchase fixed interest obligations, such as bonds and mortgages, so that on that basis there is a natural tendency for life insurance companies to have a rather limited amount of common stocks.

Q. Now taking the total amount of money that any given life company would be willing to put into common stocks, do they not have a policy of diversification in not putting all of that money in a few stocks?

A. They definitely have a policy of diversification.

Q. So that no large proportion of the funds of any one company would go into General Motors stocks or any particular stock, is that correct?

A. I think that is correct.

That is, each company would pursue a policy of diversification, so that you could be assured that they would not concentrate, for example, in General Motors to the exclusion of other stocks.

The Court: Will you speak louder, please?

The Witness: All right, your Honor.

By Mr. Bushby:

Q. Is there also a problem for life insurance companies in connection with the purchase and holding of common stock connected with a surplus?

A. Could you explain that question just a little more thoroughly? I think I know what you are driving at, but I would like to be responsive to it.

Q. Wouldn't the large fluctuations in surplus from holding common stocks be something that they would try to avoid?

A. One of the basic difficulties today with regard to life [fol. 140] insurance company holdings of common stocks is that, as a matter of State law and regulatory practice, they are required to carry their common stocks on a year end market basis. This is not true of bonds and mortgages, which they carry on an amortized cost basis.

Therefore, this particular asset would be subject to market fluctuations.

In a given year, by a sharp decline in prices of common stocks, it would reflect—it would cut into their surplus position, and this is—

You are perfectly correct—this is an important deterrent to the purchase of common stocks.

Q. Is that because the competing companies, the agents for the competing companies might point to that as an unfavorable factor in a particular rival company?

A. This has been the usual reason given.

Mr. Bushby: That is all from me. Mr. Cox has some questions, I believe.

Cross Examination.

By Mr. Cox:

Q. Mr. O'Leary, do you recall that you were asked on direct examination whether, in your judgment, General Motors was as attractive an investment to a life insurance company today as it was during the period of the thirty-four months that your study covered?

A. Yes, I do recall.

Q. And you answered that you thought it was?

A. I think the question was phrased "Is it any less satisfactory today than would have been the case—than in my opinion would have been the case from 1953 to 1955," and my answer was I know no reason why it would be any less satisfactory today.

[fol. 141] Q. I wish to carry that line of inquiry one step farther, Dr. O'Leary; and this question involves some assumptions that I will ask you to listen to very carefully.

I ask you to assume that this Court enters a decree which requires that in the next ten years each year 4,381,198 shares of General Motors are distributed to the stockholders of the du Pont Company, and each year 1,972,000 shares of General Motors are sold either on the open market or by private sale.

Do you understand those assmptions?

A. Yes.

Q. I am sorry. I am told I misspoke myself. The distribution figure should be 4,381,198.

Do you understand that correction?

A. Yes.

Q. Now on the basis of those assumptions, Dr. O'Leary, I ask you whether on those assumptions, in your judgment, General Motors would be any less attractive an investment to life insurance companies than it was during the 34-month period that was covered by your sudy?

A. Well, I would answer you this way: I think your question has more of a bearing on what life insurance companies would do with respect to their present holdings of General Motors stock. So far as I can see, if you look into the future, and even if the stock declined in value, this might be a positive inducement to life insurance companies, to buy it at a somewhat lower price.

My point would be that I think that your question would be more appropriate in terms of what they might think about their present holdings of common stock rather than in terms of what they might do in future purchases.

Q. Perhaps that would be a more appropriate question, but that is not the question I asked, Dr. O'Leary.

[fol. 142] And I gather from your answer, you say that your opinion is that they might be willing to buy at a reduced price, is that right?

A. Yes.

Q. Additional shares?

A. Yes. I think that as the years went on and General Motors stock became available, each individual company would have to appraise that situation and think in terms of the future of the automobile industry, and in terms of General Motors in particular; or I can see a situation where the mere fact that the price of the stock had come down might represent a positive inducement at some point to the insurance companies to buy it.

Q. If the price went down low enough so that they might buy it?

A. That is right. I think they would exert a stabilizing influence on the market, in other words. They would come in and buy it as it went down.

Q. Do you recall talking to Mr. Bushby and to Mr. Joseph in your office on February 11, 1959?

A. I do recall.

Q. Do you recall saying to them at that time that in your opinion the insurance companies would be reluctant to buy General Motors stock if the Government plan were adopted, unless the price were unusually favorable?

A. I do not recall that. I may have said it, but I do not happen to recall that particular remark.

Q. Do you regard that now as an inaccurate statement?

A. May I have the statement again, please?

Q. This is a statement from a memorandum written by Mr. Joseph. He says, speaking of you,

> "Dr. O'Leary thinks insurance companies would be especially reluctant to buy General Motors stock if the Government plan were adopted, unless the price were unusually favorable".

[fol. 143] A. I would not subscribe to that statement right now. I think it would be much better put in terms of the answer that I have just given you, namely, that in terms of future purchases by life companies—one thing I think you must keep in mind is that it is difficult to generalize about these life insurance companies.

They are all different annimals; they all have slightly different investment policies. But to the extent that one could generalize, I would assume that if life insurance companies have an interest in the common stock market, as the years go on, that they would look at this General Motors

stock and, if it came down in price, there would be, I think, some tendency for them to buy it at what they might regard as a very favorable price. I would rather put it in those terms.

Q. Are you in a position today, Doctor O'Leary, in your sworn testimony, to make any prediction that any particular insurance company will buy any particular amount of General Motors stock in the future, at any particular price?

A. I am not.

Q. Are you in any position to make a general statement in your sworn testimony that all life insurance companies, collectively, will buy any particular amount of General Motors stock in the future, at any particular price or prices?

A. I think may answer would have to be no to that.

Mr. Cox: That is all. Thank you, Doctor.

Mr. Andrews: I have a few questions, your Honor.

[fol. 144] Redirect Examination.

By Mr. Andrews:

Q. Doctor O'Leary, I think it was brought out on cross examination that insurance companies generally do not invest in common stocks. By that I mean they are more apt to invest in bonds or other types of debt financing.

Could you tell me, are you familiar with the experiences of insurance companies up to this point who have invested in common stocks and who have purchased them?

A. Yes, I am familiar to this extent—that we make a regular study each year, drawn from the annual statements of life insurance companies in which we are able to obtain the rate of return that they realized on corporate bonds, the rate of return on mortgages, and the rate of return on common and preferred stocks.

Of course, you realize these stocks were purchased at different times, but over the years the data shows that the rate of return on common stocks exceeded the rate of return on any other assets that the insurance companies have held.

Q. Thus, is it your testimony that their experiences that they have had in purchasing common stock have been satisfactory?

A. From the point of view of rate of return, the companies that have over the years bought common stocks have realized that rate of return that has exceeded the rate of return on corporate bonds. That, I think, in a measure is an indication of the fact that this has been a satisfactory investment.

However, one must keep in mind this other aspect; namely, the fact that life insurance companies must carry common stocks at year end market value, and it would only be fair to say that in the late Twenties and the early Thirties, a number of the Canadian companies which had held [fol. 145] common stocks would probably be obliged, if they were on the stand here, to tell you that it was not a satisfactory investment for them because they had to take very sharp write downs in their holdings of common stocks, and it caused serious inroads in their surplus position.

So that from an investment return point of view and also, I should say this, from a capital gains point of view, where they actually sold the stocks and took capital gains, they have had a favorable experience. But life insurance companies have never been large purchasers of common stocks because of this market value, the fact that they have to carry the stocks at year end market value, and there have been times in which some of them would have been quite worried, I am sure, from the point of view of the effect of this fluctuating asset value and the effect on surplus, so it is not a black and white proposition.

Q. Dr. O'Leary, if we should have a reversal in the economic life of the country; rather than an inflationary trend, we had a somewhat downward trend, what effect do you think this would have as to whether or not life insurance companies would purchase common stock? Would this tend to increase their purchases or decrease?

Mr. Cox: May we have the question read, please?

The Court: Yes. Read the question.

(Question read)

Mr. Tierney: I object to the question. The witness is incompetent or he has not shown himself competent to answer.

The Court: Overruled. He may answer.

By Mr. Andrews:

Q. Do you have the question, Mr. O'Leary?

A. Yes.

[fol. 146] If we had a fairly substantial business downturn, I think that it very likely would be true that insurance companies would increase moderately, in any event, their purchases of common stocks.

The reason for that is this: If there was a business downturn, there would be a likelihood that bonds and mortgages would be less readily available to them at attractive rates. Also, if there was a business downturn, it is quite likely that the present situation with respect to yields on bonds and stocks would change; namely, that yieldwise, common stocks would become more attractive.

Under those circumstances, in a recession that persisted for awhile and was fairly substantial, I thnk that there would be some improvement in life company purchases of common stocks. What degree, it would be hard to tell. It depends on the degree to which there might be a recession.

Mr. Tierney: I move that the answer be stricken.

The Court: Overruled.

By Mr. Andrews:

Q. For purposes of clarification, Doctor O'Leary, is it still your testimony that General Motor's stock is as attractive an investment today to the life insurance customers as it was in 1955? Do you know any reason it would not be?

Mr. Tierney: I object to that question. This witness has not shown that he has participated in the purchase of a single share of anything. He is purely a statistician who reports what has happened. He is not on any investing committee of any insurance company. He is not competent, and I think it is presumptuous on his part to presume to answer the question.

[fol. 147] Mr. Andrews: I beg to differ. He is not just a statistician. He has testified that his whole life work is in the investment field.

The Court: Do you feel competent to answer?

The Witness: Would you repeat the question, please?

By Mr. Andrews:

Q. The question I put to you is the very question which I put at the end of my direct examination. I just want to know if you have changed your answer.

A. I would like to be very specific about the way I answer that question, and that is, from the experience I have had and the knowledge I have, I know of no reason why General Motors stock today or at the present time would be any less satisfactory. I have no knowledge of any reason why it would be less satisfactory.

I would rather not put this in terms of any positive assertion that I think it is just as attractive. My answer is a negative answer in the sense that I have no knowledge to the effect that it would be less satisfactory.

Mr. Andrews: I have no further questions.

Recross Examination.

By Mr. Bushby:

Q. Doctor O'Leary, has it come to your attention that there is a federal grand jury investigation in New York City of General Motors Corporation?

A. It has not.

Q. So your answer is not based on that knowledge?

A. No.

The Court: Any other questions? The witness is excused.

(Witness excused.)

[fol. 148] Mr. Metzger: The Government calls Dr. Oberg.

HAROLD S. OBERG, called by the Government as a witness, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Metzger:

Q. For the record, will you state your name and address, please?

A. Harold S. Oberg; National Association of Investment Companies, 61 Broadway, New York City.

Q. What is your position with this Association, Doctor?

A. Research Director.

Q. Would you state your professional qualifications for that position, sir?

A. Well, I deal largely in the area of composite facts and figures about the investment company industry based on collection systems devised from individual member companies. These result in a trend service over time for our members in terms of their assets and other factors.

Q. Sir, what educational background have you had along these lines?

A. Well, I have done some graduate work in the area of economics and investments.

Q. What degrees do you have?

A. I have an MA and Ph.D from New York University.

Q. In these fields?

A. In the field—specialization in the fields of investment and statistics.

Mr. Tierney: What was that? I didn't hear that.

The Witness: My educational background, sir, was in the fields of investments and in statistics.

By Mr. Metzger:

Q. What is the National Association of Investment Com-
[fol. 149] panies, sir?

A. The Investment Company Association consists of two types of management investment companies, the open end type and the closed end type.

The managed investment company is one in which a number of investors group together their individual in-

vestments and acquire for that group an amount of money for professional management for supervision over time.

Q. Would you distinguish for us, please, between an open end and closed end company?

A. The open end investment company has a continuous supply of its own shares for sale to the investing public. I am speaking generally now. As a result, it is called open end. The individual can purchase shares, and at the same time, at the other end that investor can turn his shares back into the investment company and receive thereby the net asset value, which is based directly upon the investments that company has made.

The closed end investment company has a fixed number of shares outstanding, so an individual who wishes to buy or sell has to find another investor willing to sell or buy.

Q. You stated that the investor in the open end company could turn his shares back to the company for a net assets value. What would he get, cash or securities?

A. Well, the normal method, of course, is to turn his shares in, and he receives the net asset value then existing. There may be a small charge, but for practical purposes that is what he receives. He receives cash for his turned in shares.

Q. Could you, sir, generalize for us as to the assets, the type of assets in which investment companies participate?

A. Well, the investment companies' portfolio, and I speak now as a composite of the industry—I am not familiar [fol. 150] enough with individual companies; the figures are received by aggregates—for the open end investment companies approximately 80 per cent of their total portfolio holdings are in common stock issues; five to six per cent, perhaps, in cash items; seven per cent in bonds; and the remainder in preferred stocks.

For the closed end companies, it is somewhat a higher common stock portion.

Q. About how many share holder accounts are there at the present time in your member companies?

A. For both types, approximately 3.8 million shareholder accounts. I might point out that that is not shareholders because frequently a shareholder will own shares in more than one company.

Q. Could you give us some idea, sir, of an approximation of the number of shareholders there might be?

A. Not on a regular basis, sir, but a rough approximation would be 1,700,000 individuals and institutions.

Q. So there are about double the number or more than double the number of accounts than there are shareholders?

A. Yes, sir.

Mr. Metzger: I would like to offer for identification a document tentatively marked Government Exhibit 3.

By Mr. Metzger:

Q. Doctor Oberg, I show you this document and ask you if you are familiar with it? Are you familiar with this document, sir?

A. Yes, sir, I am.

Q. Was it prepared by your staff at the association?

A. Yes, sir.

Q. Are you prepared to attest as to its general accuracy?

A. Yes, sir.

Q. I ask you, sir, to refer to the last column, "Net in-
[fol. 151] crease in new capital." Could you explain to us, sir, what this means?

Mr. Tierney: If the Court please, I object to him reading from an exhibit that has never been offered in evidence. If it is offered, I want to make an objection.

The Court: Is it offered?

Mr. Metzger: It will be offered.

Mr. Tierney: I object to it. The mere showing of these funds available is irrelevant and immaterial unless there is some indication that this witness or somebody competent will testify that there is any likelihood that they will buy General Motors stock if this Government decree is in effect.

The Court: The objection is overruled.

By Mr. Metzger:

Q. Would you explain, sir, the meaning of the term "net increase from new capital"?

A. If I may, sir, I would like to explain some of the other columns to arrive at that.

Q. Please do.

A. The sales of owned shares given here refer to purchases by investors of additional shares in open end investment companies. The repurchase of shares by the investment companies refers to the dollar value of those shares turned in by investors for redemption.

The figure you have tabulated here as a net increase in capital is the difference between those two columns, sales of shares and repurchases of owned shares.

Q. And from your previous statement as to the amount of the percentage of the investments of open end investment companies in equities, I would presume that 80 per cent of these net increases are assigned to purchases of [fol. 152] common stocks?

A. Not necessarily so. It would depend upon the investment judgment of the individual investment company. A number of factors would go into it. I couldn't make any estimate of what portion of that might find its way into these securities.

Q. But as to each of the last several years, approximately 80 per cent of the total portfolios of the constituent member companies has been in common stock securities?

A. Not the purchases themselves, sir. The percentage I cited was a composite portfolio at some particular time, and does not refer to actual purchases that may have been made or the type of securities made in those purchases or sales.

Q. However, the portfolio of the composite companies is approximately 80 per cent in common stocks?

A. Approximately, yes, sir.

Q. Has that changed materially over the past several years that percentage?

A. There has been some increase, yes. The percentage increase can result from purchases net of common stocks, but it could also come from appreciation in value of common stocks held in portfolios.

Q. All right, sir. I would like to ask you now whether or not, based upon present facts—before I get into that, sir, may I ask if you have any figures for the year 1958? I note that this table is 1948 to 1957. Could you give us an

approximation of the net increase in new capital for the year 1958?

A. Approximately the sale of shares, purchases by investors, is about one billion six hundred million. The repurchases or redemptions is at 510 million. The approximate net after sales or repurchases is about a billion—one.

[fol. 153] Q. Now, sir, you have a bracketed statement on this table which states, "which are members of the National Association of Investment Companies." I take it from that, there are open end investment companies which are not in the membership of the Association?

A. That is correct; a very small percentage in terms of assets, however.

Q. The largest percentage in terms of assets are members of the Association?

A. That is correct.

Q. Now, sir, I ask you to base your answer to this question upon presently available figures. Is it presently anticipated that there will be an increase in shareholder accounts in the immediate future?

Mr. Tierney: What do you mean by presently available figures?

Mr. Metzger: Statistics available.

Mr. Tierney: Based upon this exhibit? Is that what your question is?

Mr. Metzger: Based in part upon this exhibit, and in part upon the increase over the past several years of the shareholder accounts to which we have previously adverted.

Mr. Tierney: That wasn't your question.

Mr. Metzger: I am sorry, if it wasn't.

By Mr. Metzger:

Q. Is the conflux of Mr. Tierney's objection and my question clear to you, sir?

A. Would you repeat the question?

Q. Certainly, sir. I am sorry.

From presently available material, which is net increase in new capital and present shareholder accounts, could you [fol. 154] presently anticipate in the immediate future a growth in shareholder accounts?

A. Well, sir, in terms of the shareholder accounts themselves, there has been some acceptance, continued accept-

ance by investors of investment company shares. However. I wouldn't address myself to a projection of the investment company industry, its size or its number of shareholders in great detail. I think it is rather a difficult question to address myself to.

Q. Could you give us any idea as to the potential of the industry in terms of size or asset value over the period of the next five or ten years?

A. Well, sir, the number of shareholders themselves that we do presently have show an increase. When we move away from shareholder accounts and other factors, evaluation of dollar amounts, you increase the number of variables, and I don't feel qualified to attempt to put down precise size of the industry or its direction of movement as regards that one factor. I do, however, say there is continued increase in general accounts.

Q. But as to any increase in new capital or assets, you feel there are too many imponderables or variables for you to make a general conclusion as to the future?

A. In attempting a precise evaluation, sir, yes, sir. Our figures are here, and those figures and others indicate more sales to new investors and, acceptedly, lower redemptions. I would not attempt to pin down any specifics as to our figures, however.

Mr. Metzger: Thank you, sir. No more questions.

[fol. 155] Cross Examination.

By Mr. Horsky:

Q. Mr. Oberg, this is a booklet which your association publishes, but you maintain it, is it not?

A. That is correct, sir.

Q. This is your series of statistics?

A. Yes.

Q. One of those is called purchases and sales of portfolios securities excluding U. S. Government securities. That is not necessarily all equities, is it?

A. No, sir, it is not. The only figure we collect is the gross figure.

Q. You do not collect statistics on the total holdings or purchases and sales of equity securities, as such, by your members, do you?

A. We make an analysis of the composite portfolio from time to time, but we do not make any breakdown on any regular basis of the total portfolio purchases and sales that might be in common stocks, preferred stocks or bonds.

Q. That is not one of your regular continuing studies?

A. That is not one of the regular continuing series, that is right, sir.

Q. You do not know, for example, how many shares of General Motors stock are owned by your members on a continuing basis?

A. I, myself, no, sir.

Q. And your association does not purport to collect that statistic?

A. We do not collect individual statistics on any continuing basis on individual securities.

Q. So you do not know, nor does your association have statistics on the trend toward purchases of any individual stock?

A. No regular service to that effect is carried on. We deal in composites of the industry.

Q. But not composites as to a single stock, however?

A. No, sir.

Q. Do you deal in composites on breaking it down by [fol. 156] industries?

A. On occasion we will run a series of a particular industry, yes, based upon——

Q. I am talking about your regular statistical studies that you make as research director for the association.

A. Not in our regular statistics series, no, sir.

Q. You are in no position to testify as to whether or not individual companies have been purchasers of General Motors stock or not during, let's say, the past twelve months?

A. No, sir.

Q. Or the past five years?

A. Not from association material, no, sir.

Q. By the same token, you would not wish to express an opinion as to what they might do in the next ten years with respect to that stock?

A. No, sir.

Mr. Horsky: That is all.

Mr. Bushby: If I may ask just one question.

Cross Examination by Mr. Bushby:

Q. You know, do you not, that there are statutory limits on open end companies as to what they may put, how much of their assets they may put in any one company?

A. Yes, sir, if you are speaking of the diversified type investment company, yes.

Q. And are most of these in your association diversified?

A. It is characteristic of our member companies. There are some that will qualify that are not diversified, but the bulk are diversified.

Q. You also know that aside from statutory limits, they have a policy of diversification of not putting a large per-
[fol. 157] centage of assets in any one company?

A. There is a definite diversification in portfolios, yes, sir.

Mr. Bushby: That is all.

Redirect Examination.

By Mr. Metzger:

Q. Sir, are you familiar with the services supplied by the Vickers Company?

A. Vickers Brothers, yes, sir.

Q. Do they purport to collect such statistics as Mr. Horsky referred to earlier?

A. If I may briefly describe the service, perhaps that covers the area. They take material based, I believe, on the latest available financial reports of individual investment companies, and from that devise a listing of the described securities held, and under those securities the holdings by individual investment companies, both open and closed end.

Q. Sir, do you have in the files of your association a list of the portfolios of each member of the Association as of any given time or for any given years?

A. Well, we receive from most companies regularly the quarterly, semi-annual and annual reports that they pro-

duce and circulate to their shareholders. We receive copies and we have them in the files, yes.

Q. Does that advert to the portfolio holdings of the particular company?

A. I am not sure I understand your question.

Q. Do these reports supplied to the stockholders show what the stockholdings of the company are?

A. One of the items characteristic of the financial state-
[fol. 158] ments or the annual reports is the listing of the portfolio holdings of the investment company.

Q. Then should you so desire, you could determine for the bulk of your member companies their holdings in any particular industrial stock, is that correct, sir?

A. From those reports, yes, you could. You would have some problems of time elements since the reports do not occur at the same time.

Q. Have you had occasion, sir, to use the Vickers Bros. work?

A. From time to time, yes, sir.

Q. Have you found it accurate?

A. Well, it is such a service that encompasses more than our membership and I have never had occasion to check it in detail.

Q. To the extent that you have had opportunity to check it or use it, have you found it generally accurate?

A. I have no occasion to think otherwise on the service itself.

Mr. Metzger: Thank you.

Recross Examination.

By Mr. Bushby:

Q. Have you ever had occasion to check Vickers Brothers reports against any other data which you considered authentic?

A. Well, sir, I don't know how many other services there may be. It is the only one of that type that I know of. There are some tabulations of quarterly portfolios—

Q. No. I asked you if you had occasion and have checked a Vickers Brothers report against any information in your possession which you considered authentic? Have
[fol. 159] you checked it?

A. I cannot say that I have tried to check entirely, no sir.

Mr. Bushby: That is all.

Recross Examination.

By Mr. Horsky:

Q. Mr. Oberg, I have here a letter on the stationery of Vickers Associates, Inc. Would that be the same as Vicker Brothers?

A. Yes, I believe it is.

Q. Are they the same thing or different?

A. Whether it is two different organizations, I do not know, but I am familiar with Vicker Brothers. Whether they call it Vickers Associates, that is what I would be referring to.

Q. The address is 37 Wall Street.

A. That is the address, yes, sir.

Mr. Horsky: Is it the same thing?

Mr. Metzger: Yes.

The Court: Any other questions?

(Witness excused.)

Mr. Reycraft: May it please the Court, we have applications for orders for the issuance of subpoenaes for persons who reside outside the district. May I hand them up?

The Court: You may.

Mr. Tierney: Do you have a list of the names?

Mr. Reycraft: Yes, we have.

The Court: There are two orders?

Mr. Reycraft: Yes, your Honor.

[fol. 160-161] If your Honor please, we would like to adjourn now to go over our documents and arrange them so we can introduce them in the morning.

The Court: That will take the balance of the afternoon?

Mr. Reycraft: Yes, indeed.

The Court: Very well.

Court is adjourned until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken in the above-entitled cause until Wednesday, February 18, 1959, at 10:00 o'clock a.m.)

[fol. 162]

Transcript of Proceedings of February 18, 1959

COLLOQUY BETWEEN COURT AND COUNSEL RE OFFERS IN EVIDENCE

The Court: Counsel may proceed.

Mr. Reycraft: May it please the Court, we have made available to counsel for the defendants and amicus curiae three volumes of documents which we intend to offer into evidence. We have not learned from them the extent of their objections as yet; and, if I may proceed, your Honor, I will begin by offering these documents.

The Court: Are there any objections?

Mr. Tierney: Yes, lots of them. Mr. Cox has some, and I have some, too, I am sure.

Mr. Cox: May it please the Court, these documents fall into certain groups. I am not sure whether Mr. Reycraft has given the Court a copy of the list which was served on us yesterday.

The Court: No. I didn't receive the list.

Mr. Cox: I think it might be helpful, your Honor.

The Court: I have the book.

Mr. Reycraft: You have the book, which includes all the documents, your Honor.

Mr. Cox: Do you have a copy of the list?

Mr. Reycraft: We can get one.

Mr. Cox. The reason I asked about that, may it please the Court, is that I would first like to address myself to the first twelve items on Mr. Reycraft's list. These items include more than 12 documents, because there are a number of documents under each item.

[fol. 163] These are all papers, may it please the Court, that were taken from the files of Morgan Stanley Company. They all relate to secondary stock offerings; that is to say, offerings of common stock sold by the owner of that stock to persons other than shareholders in the corporations whose stock is being sold. In that respect, they differ from another group of documents here, which has to do with new issues of stock which are sold by giving the stockholders of the issuing corporation a preemptive and preferential right to purchase the stock, so that this group of documents, the

first 12 items, are the secondary issues, where the sale of stock is not to the shareholders of the du Pont Corporation but to others.

These are transactions which do resemble the kind of transactions that the trustee would have to engage in under the Government Plan when he sold the stock of General Motors that is owned by du Pont, since those sales would have to be made by private sale or on the market and not by preferential offering to the shareholders of the du Pont Company.

I object, may it please the Court, to these 12 items on the ground that no proper foundation has been laid at this point by Mr. Reycraft on their admission, and I should like to explain, with the Court's permission, what the real basis and substance of that objection is.

I have stipulated to the authenticity of these documents, so that there is no question that they come from the file of Morgan Stanley and that they were written by the person whose initials appear on them, when initials and signatures do appear. In many cases I think that there is no clear indication of the name of the person that wrote them, but that is not a point of importance, so far as I concerned, because we have agreed as to their authenticity. And I am [fol. 164] not objecting to them on the ground of relevancy. I think that they have very little probative value, because the stock issues which are involved were so small in amount and so infrequent in time or covered such an incomparable period of time as compared with the period of time and the amounts that would be involved in the trustee's sales; but that is a point that goes to their weight rather than their materiality, and this objection does not rest on that ground.

My objection to these documents is this—to their being admitted in this way—these documents did not come from the file of the du Pont Company or the files of General Motors; they have to do with transactions for the most part, I think in every case in these first twelve instances, that du Pont and General Motors had nothing to do with. The documents themselves were not prepared for the purpose of being self-explanatory, so far as the matters to which they relate are concerned. They are documents that were prepared for internal record purposes in Morgan Stanley. The result is that the documents are not self-explanatory;

they do not disclose all of the facts. They are really hard to understand sometimes in relation to all the facts that would be relevant in connection with the subject matter to which the document is directed. They need a witness to explain that.

That is the truth of the matter, they really need a witness, probably from the issuing company, because he alone would be in a position to really explain all the facts.

For example, these documents—and I am not sure Mr. Reycraft understands this, and I would like to have it clear, so that if there is any difference between us we can perhaps resolve it now, at least have it out in the open—these documents, for example, show nothing about the [fol. 165] market prices, so that you can't tell from these documents really what the relationship was between the offering price and the market price, nor do they show what effect the offering had on the market price. They don't show whether the underwriting or the offering of stock was successful, since they show nothing about price. They don't show how much of the stock was sold at the offering price; they don't show whether the underwriters were able to sell it at all. Sometimes they show what Morgan Stanley was able to do, but in most of these cases, I think in all of them, Morgan Stanley was only one member of the underwriting syndicate.

They don't show whether the dealers to whom the securities were distributed had any difficulty selling them, or whether they were able to sell them all at the offering price.

In other words, these documents are simply not, as offered, it seems to me, intelligible and self-explanatory evidence.

Now, if Mr. Reycraft would lay a proper foundation for them, as I have said, I would not object to them on the ground of relevancy, although I would like to suggest to your Honor that in that connection proof, for example, that there were two secondary offerings of Aluminum stock over a period of four years—there were more than that, but they have two here—in the amount, at least, on the basis of offering price, of $49,600,000.00 is hardly appropriate on the question of whether, in this case, we can

dispose of 63 million shares of stock in a ten-year period without depressing the market price.

That is an argument on the weight, and I am not urging that now. But I say earnestly to your Honor, I think it is [fol. 166] a mistake to have shoveled into this record a mass of this material with no explanation of what it means; the documents are not intelligible and not complete and self-contained.

I think if Mr. Reycraft wishes to put these documents in, he should do so in the proper way and call a witness and lay a foundation for them.

I will say to Mr. Reycraft, which I think he knows, as a part of our case we plan to call a witness from Morgan Stanley, Mr. Sumner Emerson. If Mr. Reycraft wishes to defer use of these papers until Mr. Emerson testifies, he can then cross-examine Mr. Emerson about them and offer them at that time, and at least we will have a witness who can explain to the Court and the parties what these papers are about.

I earnestly suggest to the Court that as they stand, without a witness of some kind to lay a foundation for the papers, explain what they mean, answer questions as to their significance, they should not be admitted.

Mr. Bushby: I support the same objections, your Honor.

Mr. Tierney: If the Court please, Mr. Reycraft refers to having furnished us three volumes. He also furnished us a list of exhibits.

We got one volume. I don't know where the three volumes come from.

He is proceeding contrary to the order of this Court because he only gave us notice yesterday that he was going to use these exhibits. We would like to cooperate as best we can. Now, he purports to read from a book that has no identification, and I object to that because the record [fol. 167] will be a hodge-podge. I think at least the book from which he is reading should be marked as an exhibit, and I think each page of the book should be given a number so we know what we are talking about.

I concur in all of Mr. Cox's objections except that I do think there is another objection which we apparently don't see eye to eye on.

I would like to object to these documents contained in an

unnumbered book from which he started to read, which they gave us yesterday afternoon. We object to all the documents offered by the Government listed under 1 on the ground that all of them are irrelevant and immaterial. The documents apparently are offered to show that a lot of money has been available for investments in securities of various kinds. But it does not help the parties or the court to learn that money has been available for bonds or other security issues dissimilar to the forced sales here contemplated. Nonetheless that is the most shown by these documents.

The documents relate to 49 different security issues. 17 are straight debentures. One is a sinking fund debenture issue and one is a new preferred stock issue, all obviously different from our situation. One is a new convertible preferred stock issue and three are convertible debentures.

Yesterday the Government witness, Scanlon, of AT&T, pointed out how different those are from what the Government here proposes.

Scanlon also highlighted the difference between our case and the offer of new stock with preemptive rights in which existing stockholders are offered something extra for value. Yet 14 of the security issues involved in the proposed exhibits were of those matters. Only 12 of the 49 issues in-[fol. 168] volved in the Government's exhibits were secondary offerings. But even those are unlike what we are faced with here.

The amounts of stock involved were small, both in dollars and in number of shares. Substantially all were one time offers, with no certainty that other like issues would overhang the market in each succeeding year. In each, the seller had unrestricted liberty to choose the time of the particular offer, thus enabling the underwriter to exercise his professional skill in the selection of the best time to sell.

That is not so under the Government's proposed decree.

We also object to the following specific items on the grounds listed:

Document No. 47 under secondary issue, No. 3, on the ground that it is incomplete because it lacks Page 2, which is Document No. 48.

Document No. 718 under new issues No. 2, because it is not even relevant to the particular stock issue involved. The chart which is numbered 718 terminated with the date

of April 25 or 26, 1952, whereas the particular stock issue was not offered until May of 1952.

There are innumerable instances of this hodge-podge in the volume that he has handed us. Now, we don't want to obstruct this orderly trial, but if we are going to be handed a book of documents the night before and they say that they are going to be offered the following morning, that is contrary to your Honor's order, and it will make a record here that is hodge-podge. We would like to proceed. So I object to this whole procedure of reading from the documents until we get the matter straightened out.

[fol. 169] There are innumerable instances of discrepancies in this. For example, Document No. 168, listed under new issue No. 15, this is a letter from someone at Morgan Stanley to the president of Socony Vacuum commenting on the successful conclusion of the underwriting and comparing the action of Socony Vacuum stock during the underwriting with that of other oil stocks. The letter refers to an attached table, which does not appear.

The Court: I am going to suggest that the Government defer the introduction of this until you confer with counsel to see if you can work out an agreement or stipulation to save time. You have other matters to present, haven't you?

Mr. Reycraft: Your Honor, we had intended to take up the day with these documents, and I may say we understood we would be able to make some progress on this matter yesterday.

If I may, I will address myself to each of Mr. Tierney's objections.

The Court: You don't have witnesses available for today?

Mr. Reycraft: We have one coming this afternoon, but we understood the morning and perhaps this afternoon would be taken up with these documents.

The Court: What does the order provide with respect to these exhibits?

Mr. Reycraft: With respect to furnishing documents for examination with respect to authenticity, the order provided five days. These documents have, in fact, been available and in the defendants' hands for a month. At the time we [fol. 170] took Mr. Emerson's deposition, the parties received copies of the documents.

Of course, as I pointed out to your Honor yesterday, we did make a mistake in that the list which we prepared was not sent to the defendants.

If I may, I would like to take up the objections one by one. Now, apparently, what we would have to do in order to satisfy Counsel is to call the treasurer of each company which has had a stock issue over the last seven or eight years. We don't think that is fair to the Court or that it is really necessary.

These papers were prepared for Morgan Stanley's use in connection with issues they managed or in which they participated. They are business records prepared for the use of that company. We think they are very proper documents, and they speak as well as any business record can for the facts which are contained in the documents.

We don't intend to offer the whole book in evidence. We intend to go through these documents one by one and as objections are raised, if they must be in that fashion, why, we will discuss them.

Apparently counsel take the position that unless we can show an issue of stock which is exactly the proposed judgment, why, it has no relevance in this case. Obviously there are no two issues of stock exactly alike, and there is no way we can do that. We are talking about the future, and the only way we know of to forecast what may happen in the future is to talk in terms of what has happened in the past.

Of course, Mr. Emerson is in the courtroom, and I suppose there is no real question about the authenticity of the documents or the fact that they did come from Morgan Stanley's files or that they are business records of Morgan [fol. 171] Stanley. We intend to go through and mark each exhibit, and if the Court thinks it would be helpful and to save your Honor's time, we have no objection to going through them with the reporter without your Honor spending a lot of time on it.

If we can dispose of the objections or, at least, narrow them in that way, we would be very glad to do it, but we don't think we should be required to call the treasurer or controller of each of these companies in every case.

Now on some of these issues, we do intend to put on other underwriters and have them discuss the issues which they have underwritten. We also intend to offer exhibits which

show the market action in the terms of price of many of these issues of stock. We haven't done it with respect to each issue because we don't think it is necessary.

As I said, the defendants have had these documents over a month. Their authenticity has been stipulated for all of that time, and we don't think these objections are very helpful.

Mr. Cox: If the Court please, I am sure Mr. Reycraft doesn't wish to leave you with an erroneous impression.

I would like to be clear about that.

We have had documents, but the documents in total fill, at least the ones we have from just Morgan Stanley, fill four manila envelopes or files.

Mr. Reycraft: That is true.

Mr. Cox: We didn't know which ones Mr. Reycraft was going to use. I think it was purely a mistake on his part, but he didn't give us the list until yesterday. I, myself, was up until midnight going over these documents, and we haven't finished the list yet.

[fol. 172] I don't think Mr. Reycraft can really say to the Court or leave the impression that we really knew what he was going to do. We didn't.

I want to say again, I think if Mr. Reycraft wants to put these in, my objection went only to the first 13. I have other objections when Mr. Reycraft gets to bonds and debentures and stock rights issues. But the secondary—I go a little bit further than Mr. Tierney does. I say that those may have some remote relevance. I don't think they have any probative value, but I don't think Mr. Reycraft should be allowed just to shovel a mass of documents into the record without any explanation.

He himself says he is going to have witnesses on some of these. If he doesn't have witnesses on the rest of them about the market impact, about what was done, the evidence is worthless anyway. Why should he put it in? I think he really should call a witness.

Now, it is too bad—I don't like to be here while all this goes on. If Mr. Reycraft wants to try every security issue that he thinks may help him for the past ten years, of course, this will be a long proceeding. But may it please the Court, we have to protect our rights. We have to put in evidence on these issues to show that they aren't similar,

and the best way to do it is to have Mr. Reycraft present a witness. There is no escape from it.

Mr. Reycraft: We are trying to avoid going into an infinite amount of detail on each issue, and we think the best way to do it is to present a document which summarizes the basic nature of the issues. It discusses the number of shares issued, the price, the underwriter spread, the amount of time in general which it took to sell the stock. [fol. 173] This, we think, is very important. For example, many of the documents indicate that an entire large issue would have been sold in a few hours. We think this is highly probative and should be relevant to this case.

It seems to me that to adopt the procedure Mr. Cox has suggested would prolong the case and require trying each issue in a manner which would unduly prolong the trial.

Mr. Bushby: If your Honor please, I would like to support Mr. Cox' objection. I don't think it is proper in any trial to shovel in papers. I think a document is only admissible when there is a witness on the stand to indicate the relevance of it.

Mr. Reycraft talks as if these documents summarized the situation and told all about it. Now, here is one of them. This is Paper No. 47. It gives the number of shares. It says somebody managed the account. It says there was an offering made at a certain price. But we talked with Mr. Emerson about these documents last night, and they do not indicate whether the offering was successful. They do not indicate what relation the offering price had to the market price. They do not indicate what happened to the market price when the offering was announced. They do not indicate whether all this stock was left on the dealers' shelves.

It is quite untrue that it shows the period during which the stock was sold. It shows the period in which the syndicate closed up, but that doesn't mean the stock was disposed of.

These are not probative papers, and I say there must be a witness on the stand to explain these papers, or they just have no probative value.

[fol. 174] The Court: Do I understand you have a representative of Morgan Stanley here who is familiar with these?

Mr. Reycraft: Your Honor, Mr. Cox has informed us that he will call as a witness in the case Mr. Sumner Emerson, whose deposition we took.

We have not called Mr. Emerson. I think what Mr. Bushby and Mr. Cox would have us do is to put on their defense through Mr. Emerson.

We think Mr. Emerson will undoubtedly have a good deal to say about each of these issues when he does testify. We don't think it necessary or appropriate right now to permit him to do it at this moment.

The Court: You are not calling him?

Mr. Reycraft: No, indeed.

Mr. Dallstream: I would like to say just a word about this procedure. I sat here quietly yesterday and saw the evidence brought in about the public utility issue, the sale of debenture bonds, convertible over a long period of time, in which the common stock was sold at prices from 25 or more per cent below the market.

We, at least, had yesterday the opportunity to get a little information from the treasurer of the company who offered these securities. Today we are presented with a situation in which a lot of testimony by record is being offered. I haven't received a list of these documents. I had no knowledge at all that they were going to be offered this morning.

I have never seen the documents, unless it is a part of some material that might have been delivered at our office [fol. 175] many, many weeks ago. But I certainly had no knowledge it was going to be offered this morning nor have I had a list or any summary of what items out of that great bundle of stuff are to be offered. I have been furnished with no book of the character which, apparently, is available, and I don't think Mr. Cowen has been.

I would like to say this to your Honor. There is nothing that is as dissimilar as one corporate security issue from another.

Today there is a successful issue; tomorrow there is a failure. Today one goes out the window; tomorrow another one comes out that is sticky and on the dealers' shelves. Even though you close out the selling account, for many, many years it may lay around the banks of the country, undigested and undisposed of.

I think if we are going to have samples of security issues that may have been offered over the years in an attempt on the part of the Government to draw the conclusion, because those issues succeeded, that you can somehow magically run up the total amount of money involved and prove by that that you can dump General Motors stock on the market with regularity and with certainty year after year and have successful offerings, we are at least entitled to have the witnesses who know the most about those security issues here to relate them and determine whether there is sufficient similarity between the problems that were met in connection with those offerings and the ones that may reasonably be expected in the case of the distribution of General Motors. Otherwise we might just as well back a truck in here and dump the stuff by a dump truck.

[fol. 176] The Court: You stated that Morgan Stanley was the manager in all these issues?

Mr Reycraft: They participated in the co-management, yes, sir.

The Court: It seems to me it would be a very simple matter to have a man here from Morgan Stanley to identify them and then proceed with them.

Mr. Reycraft: We will be glad to do it.

The Court: I think that is the simplest solution here.

Mr. Reycraft: All right.

The Government will call Mr. Emerson.

The Court: All right.

Sumner B. Emerson, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Reycraft:

Q. Mr. Emerson, would you state your full name, please?

A. Sumner B. Emerson.

Q. And your employment?

A. Partner of Morgan Stanley.

Q. How long have you been a partner of Morgan Stanley?

A. Since the partnership was formed in 1941, and prior to that I was an officer of the corporation that preceded it.

Q. As a partner in Morgan Stanley, what has been your principal duty?

A. Well, they are very varied. I have been active in syndicating, meaning the wholesaling of issues; the sale of [fol. 177] issues to institutions; the drawing of documents in connection with new issues. It has been a very varied responsibility.

Q. Mr. Emerson, I hand you a document entitled "Registered Secondary Aluminum Company." Are you familiar with the issue involved in that document?

A. Well, I know that we participated in it.

Q. Did that document come from your files?

A. I assume that it did. It looks like our document.

Q. Is it a business record of Morgan Stanley?

A. Yes.

Mr. Reycraft: I offer this document in evidence as Government Exhibit No. 4.

(Said document was marked as Government's Exhibit No. 4, for identification.)

Mr. Bushby: Your Honor, I object. There has been no explanation by the witness of what the document shows or anything about it.

By Mr. Reycraft:

Q. Will you describe the document, Mr. Emerson?

Mr. Tierney: What is the number?

Mr. Reycraft: It is No. 12 in the lower left-hand corner. This is the number given the document by Morgan Stanley.

By the Witness:

A. This is a sheet made up by our syndicate department to describe, largely from an accounting point of view, what happened in the case of the offering of 200,000 shares of common stock of Aluminum Company of America on October 3, 1955.

By Mr. Reycraft:

Q. How many shares of stock were involved in that issue?

A. Two hundred thousand.

[fol. 178] What was the offering price?

A. $78 a share to the public.

Q. What was the offering date?

A. Apparently the date of the prospectus is October 3, 1955. The offering date was the same date.

Q. Does the document show when the books were closed on that offer?

A. I don't know what you mean by books closed. The agreement among dealers was terminated October 4th. The accounts with the underwriters were settled on November 2nd.

Mr. Reycraft: I think that is sufficient identification.

Mr. Cox: Is that being offered in evidence?

Mr. Reycraft: I now offer the document as Government Exhibit 4.

Mr. Bushby: I would like to ask the witness some questions as to the admissibility of this piece of paper.

The Court: You may.

Mr. Bushby: Mr. Emerson, does this indicate in any way what the market value of the shares of Aluminum Company was prior to this offering?

The Witness: It does not.

Mr. Bushby: Or at the time of the offering?

The Witness: No.

Mr. Bushby: Or after the offering?

The Witness: No.

Mr. Bushby: Does it indicate whether the offering was a success?

The Witness: Insofar as Morgan Stanley was concerned, it indicates it was, but not the offering as a whole. There is nothing here to indicate the overall success of the offering.

[fol. 179] Mr. Bushby: You separately underwrote, individually and severally, and not jointly, ten thousand shares, is that correct?

The Witness: That is correct.

Mr. Bushby: Only ten thousand shares out of the two hundred thousand?

The Witness: That is correct.

Mr. Bushby: You don't know what happened to the other 190,000?

The Witness: That is correct.

Mr. Bushby: You don't know whether they were on the dealers' shelves, then or now?

The Witness: I don't remember the offerings.

Mr. Bushby: And this doesn't show it.

The Witness: I could not speak from memory, and I see nothing here to indicate it:

Mr. Bushby: I object, your Honor. The paper is not probative.

By Mr. Reycraft:

Q. Do you know how many dealers were involved in this issue?

A. No, I do not.

Q. Do you know how many underwriters were involved?

A. No, sir.

Q. Were there more than a hundred underwriters involved?

A. I don't know that.

Q. You have no idea whatever?

A. No. We did not handle this.

Mr. Reycraft: I submit, your Honor, in order to, apparently, do what Mr. Bushby wants, we would have to call each underwriter and each dealer who participated in this offer. [fol. 180] Mr. Bushby: That is correct.

The Court: To be of any value, I am afraid you will have to do that. This witness isn't familiar with it.

Mr. Reycraft: Well, your Honor, this same thing applies to our other documents that are all from Morgan Stanley. He says he is familiar with the issue to the extent of the information shown on the documents, which is all we intended to show.

Mr. Bushby: It doesn't show anything; the document shows nothing probative in this case.

Mr. Reycraft: It shows the number of shares issued; it shows the price of the stock.

Mr. Bushby: No, the shares were not issued; the shares were outstanding.

Mr. Reycraft: They were sold.

Mr. Bushby: We don't know whether they were sold; it doesn't show whether they were sold to the public.

Isn't that correct?

The Witness: That is correct.

By Mr. Reycraft:

Q. Does it show that they were offered to the public?

A. It shows that they were offered.

The Court: The most important phase is missing. The offering is only the beginning. What happened to the sale?

Mr. Reycraft: Your Honor, I certainly will admit that we cannot prove that every share to this stock was sold.

The Court: You haven't shown that any part was sold except the ten thousand shares, is that correct?

Mr. Reycraft: That is right, your Honor. We have shown that it was offered for sale.

[fol. 181] The Court: Well, I say what happened to the balance is quite important.

The Witness: This doesn't show, sir, that Morgan Stanley sold ten thousand shares; it shows that of the ten thousand shares which we underwrote, we retained for sale two thousand shares; we retailed six hundred of those and released the fourteen hundred back to the manager. We were unable to sell them.

And the balance of our commitment—we sold six hundred shares retail out of our commitment of ten thousand.

By Mr. Reycraft:

Q. Do you have any knowledge that your experience is any different from any of the other underwriters or dealers?

A. I could only guess.

Q. What is your guess?

A. I would think that some of them had better results than we.

Q. Do you have any knowledge that any of them had any difficulty selling them?

A. I have no knowledge on that. This issue was in 1955. A great many issues go through our office, and I don't remember this issue at all.

The Court: The Court stands recessed for fifteen minutes.

(A short recess was taken.)

The Court: You may proceed.

Mr. Reycraft: May it please the Court, I submit that the exhibit marked No. 4 shows the following information on its face: that it is a registered secondary involving 200,000 shares of Aluminum Company of America; that the agreement among the underwriters was signed on September 30, 1955; that the offering date was after 3:30 p.m., October 3, [fol. 182] 1955; that the purchase price was $76.00 a share; that the offering price was $78.00 a share; that the total spread was $2.00 a share; that the payment date was October 7, 1955; and that the offering provisions of the Agreement amongst the underwriters was terminated on October 4, 1955.

I think this is probative, your Honor, and it is relevant in this case. We cannot put on every fact relating to every issue at one time; we do have to start somewhere. We intend to produce experts who will discuss these issues, and I submit, your Honor, that we should be permitted to offer this document for the information which it does show on its face.

The Court: Will you have oral testimony later explaining them?

Mr. Reycraft: Yes, indeed, your Honor.

The Court: For instance, what happens to the offering——

Mr. Reycraft: Yes, we will, your Honor. In fact, we will subpoena a partner of the First Boston Corporation, which managed this issue, to testify about it.

Mr. Bushby: If your Honor please, I think that is the time when the document should go in. Morgan Stanley was a mere participant in this underwriting for 10,000 shares, and this is a memorandum of what happened to that 10,000 shares, and nothing more.

If we are going to have the First Boston man here, he will have the syndicate books to show the whole thing. I submit that time is the time to put in any evidence relating to this offering.

The Court: It appears to me that your offering is pre-
[fol. 183] mature; as long as you are going to bring in witnesses to explain them, why not defer them until you bring them in? What would be the advantage of offering them at this time?

I think the better procedure is to defer the offer until you have the witnesses to explain them.

Mr. Reycraft: Do I understand, your Honor, then as to each of these issues discussed that we should call the managing underwriter? We will be glad to do that.

The Court: Anybody who has information about it.

Mr. Reycraft: Your Honor, I submit that Mr. Emerson has information about this. Information from Morgan Stanley is contained in this document. While it isn't all the information, we will never get all the information about all these offerings.

The Court: If there weren't a further explanation, this could be very misleading to the Court, looking at this record. It is not complete. So I think the better practice is this, and you will save time by offering them as you are prepared to explain them, so they will have some evidentiary value, which they do not have now.

Mr. Reycraft: We will go on then, your Honor, with issues which Morgan Stanley managed.

The Court: Very well.

Mr. Reycraft: Will the reporter please mark for identification the document headed, "Title of Issue, General Motors Corporation, Common Stock, $5 Par Value," and above that the figure 4,380,683 shares.

The Court: What number would that be in the book?

Mr. Reycraft: That is in Book 2, your Honor.

[fol. 184] Mr. Tierney: We haven't seen that, your Honor.

Mr. Reycraft: Book 2 was made available to all defendants yesterday, your Honor. Counsel examined Book 2 last evening. We don't know on whose behalf it was examined, but we advised counsel that they were available for examination.

I have Book 2 to hand up to your Honor.

Mr. Tierney: The last thing I want to do, your Honor, is try to make it at all embarrassing for Government counsel; I would serve no purpose in that; but we can't represent our client in this case unless we get some idea of what is going on.

The Court: Do you have 2?

Mr. Tierney: I don't know; I haven't seen it, your Honor.

Mr. Reycraft: He has one of the documents relating to a General Motors rights offering in 1955.

Mr. Tierney: When did you serve notice on us about offering those exhibits?

Mr. Reycraft: As we told the Court yesterday, these books were available last evening to you.

Your Honor, they have these documents and have had them for about six months now.

Mr. Tierney: We have bundles of documents, counsel; but in order for this case to proceed orderly you were to let us know, "These are the documents I propose to use."

Now we haven't had that yet.

Mr. Bushby: And we have not had those documents, either, your Honor.

If the Court please, may I suggest this—and Mr. Reycraft—there are two or three offerings on the secondaries [fol. 185] of the first sheet you handed us yesterday, of which Morgan Stanley was the managing underwriter. I suggest that you ask about those and save time.

Mr. Cowen: May I make another suggestion? Might we let this go until two o'clock, your Honor, until we can straighten out the exhibits among counsel, so that we each know which exhibits are to be offered and in what order, and we will each have a copy of the documents and the books they are talking about? At that time I think we can all go into the matter more intelligently.

The Court: That is a good suggestion, except that I understand that you have one matter that this witness is familiar with and that you gentlemen know of.

Mr. Reycraft: Very well, your Honor, we will go into the matter that is in the first book.

Will the reporter please mark this as Government's Exhibit No. 6 for identification?

(Document so marked.)

The Court: What page would that be in my book?

Mr. Reycraft: Number 10 in the first book, the tenth document, which is entitled, "Registered Secondary."

The Court: What page is it?

They are numbered on the left margin.

Mr. Reycraft: Number 47.

Mr. Cox: What issue?

Mr. Reycraft: American Can Company, 392,000 shares.

The Court: They don't seem to be in consecutive order [fol. 186] here; they jump from 43 to 129. Will you see if you can find it?

Mr. Reycraft: All right.

By Mr. Reycraft:

Q. Mr. Emerson, will you describe the document which I have handed to you?

A. This covers the registered secondary offering on October 6, 1955, 392,000 shares of American Can Common stock.

Q. Did your firm manage or co-manage this issue of stock?

A. Yes, sir, we co-managed.

Q. Does the document indicate the date on which the agreement among the underwriters was signed?

A. October 6, 1955.

Q. Does it indicate the offering date?

A. The same day.

Q. Does it indicate the purchase price of the stock?

A. $41.25.

Q. And does it indicate the offering price?

Mr. Tierney: If the Court please, I suggest that the witness answer those questions yes or no without getting the contents of this document in the record, without its having been offered. I am going to object to it on the ground that I previously objected to it: that it is irrelevant and immaterial. So I prefer to have him say yes or no to those answers without getting the contents in the record.

Mr. Reycraft: Well, it seems to me that in order to identify the documents sufficiently, we are going to have to get this information into the record.

[fol. 187] The Court: Well, he is objecting to the manner in which you are proceeding.

The objection is overruled.

By Mr. Reycraft:

Q. Will you please state, Mr. Emerson, the date on which these subscription books were closed on this offering?

A. October 6, 1955.

Q. And will you state the number of dealers who participated in this offering?

A. There were 110 underwriters plus 104 dealers.

Mr. Reycraft: I offer Government's Exhibit No. 6 in evidence, your Honor.

The Court: Well, the exhibit that I have says, "Number of dealers, 122."

Mr. Reycraft: He is reading from the higher—from about six lines up where it says, "Purchased by 110 underwriters." I believe that his answer was not responsive. He gave the number of underwriters rather than the number of dealers.

The Witness: I gave both. There were 110 underwriters and 104 dealers. 18 of the underwriters also acted as dealers, but I subtracted them from 122, because there is a duplication there.

Mr. Reycraft: With that explanation I offer Government's Exhibit No. 6 in evidence.

Mr. Tierney: Objection.

The Court: Overruled. It may be received in evidence.

(Whereupon said exhibit, marked Government's Exhibit No. 6 for identification, was received in evidence.)

[fol. 188] By Mr. Reycraft:

Q. Mr. Emerson, did your company manage or co-manage the issue of North American Aviation Company in 1956 for 1,145,011 shares?

Mr. Bushby: If your Honor please, I didn't object to the introduction of the exhibit relating to the American Can offering. I assumed that that was just a start, that Mr. Reycraft was then going to go on with Mr. Emerson and ask him what the market price, the market value of Can stock at the time, and what effect the offering had, and whether the syndicate was a success or not, and finish up with that. I think we are in hopeless confusion if we just put in the isolated piece of paper without going on with it.

The Court: I think it should be explained, counsel.

By Mr. Reycraft:

Q. Mr. Emerson, will you explain whether in your opinion the American Can Company offering was a success?

A. As I remember it, it was.

Q. Will you describe what you mean by "success"?

A. I mean that the underwriters were able to sell either to their own clients or to other dealers the entire amount of the stock.

Q. Do you recall the period of time which it took to sell the entire amount of stock?

A. This was a registered secondary. During the period after the registration statements has been filed, underwriters are allowed to solicit orders. The registration statement would not become effective for about three weeks after it was filed, so that there was a solicitation during that entire period.

[fol. 189] Q. You have testified, I believe, that in your opinion the offering was a success?

A. As I remember it, it was.

Mr. Reycraft: Do you have any questions?

Mr. Bushby: Yes.

By Mr. Bushby:

Q. Have you any information, Mr. Emerson, with you that would indicate the market value of the American Can Company stock prior to the offering, during the offering, and after the offering?

A. I have not.

Q. You do not have that?

A. No.

Q. Do you have any information as to whether, aside from the underwriters, dealers were able to sell the stock, whether the dealers were left with some of the stock?

A. Well, speaking from memory, I would say that they were able to.

Q. In this case?

A. In this particular case.

Q. The dealers were able to sell the stock?

A. To the best of my memory this was a successful issue.

Q. And to the best of your memory, it did not depress the price of American Can on the market to any extent?

A. Oh, I don't say that at all, now.

Direct Examination.

By Mr. Reycraft:

Q. Will you explain your answer in a little more detail as to, if you know, whether there was any depressing effect on the market of this issue?

A. I don't remember the quotations, Mr. Reycraft, but it would be a very unusual secondary offering of this size if it did not have an effect on the market.

Q. But as to this specific secondary, you don't know, is that right?

A. I don't have the data.

[fol. 190] Q. For the record, Mr. Emerson, will you explain what a registered secondary is?

A. Well, a secondary offering is one where the owners of the stock are offering it, and not the issuing company. A registered secondary is one, because the sellers are in some way related to the company, that it might be construed that they had a voice in control, and therefore it had to be registered under the Securities Act.

Q. Will you explain whether a secondary issue involves raising new money?

A. A secondary issue involves raising money only for the seller, not for the company.

Q. Will you compare what is commonly known as a right offering with a registered secondary, or any kind of secondary?

A. Well, a rights offering is where a company offers an equity security to its own stockholders. That could be a common stock offering or a senior security with an equity privilege. In other words, a warrent or convertible privilege. Where they are offered to the stockholders they are offered pro rata, each stockholder receiving a warrant which entitles him to subscribe to his proportion of the issue. Those warrants are, in practically every case, negotiable, so that if the stockholder does not wish to exercise the right himself, he can sell it to someone else.

Q. So that these rights do have a market value?

A. They should have a market value, if it is a successful issue. Sometimes they don't.

Q. Mr. Emerson, with respect to those rights which are not exercised by the stockholders, what is the general practice with respect to exercising them?

A. If they are issued to the stockholders, and the stockholders don't exercise them, nothing happens to the right. If the issue has been underwritten, the underwriting group is obligated to take up the securities in question on which [fol. 191] the rights were not exercised.

Q. By "taking up the issue," will you explain what you mean?

A. They buy it from the issuing company at the subscription price, and it then goes to the underwriters, and it then belongs to the underwriters, and they sell it if they can.

Q. They sell it if they can.

Now, will you describe the mechanics by which the underwriters sell the stock which has not been taken by the stockholders?

A. It can be done in several ways. If it is very small amount, it can be, at least under agreements which we generally have, it could be sold on the New York Stock Exchange, if it was a listed security. That would be unusual.

Usually the unsubscribed amount is offered at the market value. Underwriters and other dealers come in and take it down at the price that the manager has set, less a concession, and they sell it in turn to their clients.

The manager also has a right, if he wants to do it, to what we call "whack it up"; in other words, divide it among the underwriters in proportion to their underwriting commitments.

Q. Now, does the term "lay-off" apply to this procedure?

A. Will you state that question again?

Q. Are you familiar with the term "lay-off"?

A. Yes, sir.

Q. And will you explain what it means?

A. During the subscription period and the rules that have been approved by the SEC, the underwriters, the managing underwriter, rather, is allowed to buy rights in the open [fol. 192] market, either on the New York Stock Exchange, or whatever stock exchange the rights are traded on, or under exceptional circumstances, where the amount is large, he can go directly to the holder of the rights, but those rights for the account of the underwriting group, exercise those

rights, take up the securities to which the rights apply, and offer those to the public during the subscription period. He offers them through the underwriters and through other dealers.

Q. Now, with respect to Government's Exhibit No. 6, which relates to the secondary issue of American Can Company, what was your testimony with respect to the depressing effect of this secondary?

A. I said that I didn't know, but that it would be unusual if an offering of this size did not have a depressing effect.

Q. Do you recall offhand what the total dollar value of this offering was, or can you compute it from the document?

A. It can be computed, 392,000 times $42.75.

Mr. Cox: That is about $16,758,000. It was computed last night.

By Mr. Reycraft:

Q. Will you adopt that answer, Mr. Emerson?

A. I will accept Mr. Cox's computation.

Q. Mr. Emerson, with respect to the depressing effect which you testified generally occurs after secondary issues, will you state generally how long this depressing effect lasts?

A. Well, it starts when the announcement is made. This is a registered secondary. I presume that it was not announced until the registration statement was filed. The depressing effect would start right then, and would continue through the period of the offering and a subsequent period of digesting the offering.

[fol. 193] Q. In the case of American Can Company, how long was that?

A. Well, it must have been three weeks. It was filed three weeks prior to the offering, approximately. How long that would have affected the market after the offering, I don't know.

Q. Would you say as much as a month?

A. I think less than a month.

Q. Two weeks, would that be more——

A. That would be more reasonable.

Q. So that the depressing effect would have been dissipated by the end of two weeks?

A. In this particular case, because this is a successful offering. I am guessing at that, Mr. Reycraft.

Q. Well, on the basis of your experience, Mr. Emerson, your guess is as good as anyone's.

Mr. Emerson, did your firm participate, or did they manage or co-manage——

Mr. Bushby: May I ask one more question regarding this American Can, to finish up?

Mr. Reycraft: Yes.

Mr. Bushby: In connection with an offering of this kind, does not the syndicate run an account, long and short, which they may buy stock of the same issue, the short stock of this issue, a stabilizing account?

The Witness: Yes, they always have the right under the agreement to do that, and the manager may or may not, as he thinks the marketing requirements make necessary.

Mr. Bushby: And that account may make money or lose money in a particular instance?

The Witness: Yes, sir.

[fol. 194] Mr. Bushby: And that doesn't appear on these sheets of the kind you are looking at necessarily?

The Witness: It does in this particular one.

Mr. Bushby: Whether they made or lost money?

The Witness: That is not shown.

Mr. Bushby: Do you happen to remember whether that account made money in this case, or lost money?

The Witness: On the stabilizing transactions?

Mr. Bushby: Yes.

The Witness: Well, the stabilizing transactions, according to this, were commenced on October 6th and terminated on October 7th. I would assume we would have lost on it, but I don't know.

Mr. Tierney: One brief question.

With respect to this American Can offering, of course, there was a registration statement and a prospectus that was got out on this, a registration?

The Witness: This was a registered secondary, yes, sir.

Mr. Tierney: Was there any mention in that, or was it a fact that American Can intended to offer each year for ten years thereafter, any number of shares of stock?

The Witness: There was no such announcement, sir.

Mr. Cox: Mr. Reycraft, just so that there will be no confusion about this, in one answer that the witness gave, is it not a fact that there are two pages to this document, because

I think if the witness were given the second page, he might want to at least explain an answer, previous answer that he gave. I believe that is the second page.

The Court: I only have one page.

[fol. 195] Mr. Reycraft: I only have one page, too, your Honor.

Mr. Cox: Everyone else has two pages, apparently.

By Mr. Reycraft:

Q. Well, for the purpose of refreshing your recollection, Mr. Emerson, would you care to explain any of your answers on the basis of that document (indicating)?

Mr. Cox: The answer I was curious about was the one you gave to Mr. Bushby with respect to the stabilization, the long and short operations. The last item on the page, did that have any significance in relation to your prior answer?

By the Witness:

A. Well, the loss was substantially larger than I would have guessed.

Mr. Cox: There was a loss?

The Witness: According to this, $17,285.

By Mr. Reycraft:

Q. Mr. Emerson, returning to the question of North American Aviation, the issue of 1,145,011 shares on September 7, 1956, did your firm manage or co-manage that issue?

A. Yes, sir.

The Court: What page is that, counsel? These are not in consecutive order.

Proceed, please.

By Mr. Reycraft:

Q. Mr. Emerson, did you personally participate in this issue of North American stock?

A. We managed the offer.

[fol. 196] Q. You personally participated, and you personally were familiar?

A. In a general way. I did not handle it myself.

Q. Do you recall the offering price of that stock?

A. No, sir.

Q. Does this refresh your recollection (indicating)?

Mr. Bushby: If the Court please, I would like to interpose an objection to the whole line of testimony relating to this offering: As I understand it, this is an offering by the issuer of the stock with rights to subscribe, is that correct?

The Witness: That is correct.

Mr. Bushby: And on the testimony of Mr. Seanlon, the Government's own witness yesterday, it was quite plain that the mechanics, the whole situation was entirely different in connection with a new issue by the issuing company, and I think it is quite irrelevant and immaterial in connection with the secondary offering of the type involved in the Government's proposal.

The Court: Well, that would go to the weight and credit to be given to the exhibit rather than to its admissibility.

Mr. Reycraft: If your Honor please, the witness testified that some of the stocks have been laid off in the manner similar to secondaries which is what——

Mr. Bushby: No, not similar to secondaries. There is no laying off in secondaries, is there, Mr. Emerson?

The Witness: It is the sale.

Mr. Bushby: I think we are going to get into a morass [fol. 197] of testimony on all these stock issues, original offerings and all the bond issues of securities introduced into this case. I think we are going to have enough if we go into the secondaries that have some bearing.

Mr. Reycraft: This is an offer of common stock——

Mr. Bushby: With rights issued to a whole body of stockholders at a price which the companies can pick, not to get the highest price, and the owners of the rights can take the rights to the banks and borrow to buy the stock without regard to margin requirements.

The whole thing is so different from a secondary that it is completely irrelevant.

Mr. Tierney: I join in that, if the Court please.

The Court: The Court will rule on the admissibility of the exhibit after the completion of the testimony by the witness.

By Mr. Reycraft.

Q. Does Government Exhibit No. 7 for identification show the number or amount of common stock which was taken up by the stockholders through the exercise of rights?

Mr. Tierney: I suggest he answer that question yes or no, without reading from the exhibit.

The Court: Can you answer that yes or no?

The Witness: Yes.

By Reycraft:

Q. How many shares were taken up, Mr. Emerson?

Mr. Tierney: That is objected to. The exhibit itself is the best evidence.

Mr. Reycraft: Your Honor, I started out on the assump-
[fol. 198] tion that the exhibit is the best evidence, and I and glad to proceed on that basis.

The Court: He may answer.

By the Witness:

A. 1,122,788.

By Mr. Reycraft:

Q. Does the exhibit show the number of rights which were not subscribed to or not taken up by the stockholders?

A. It shows the number--the number of rights not taken up?

Q. That is right.

A. No.

Q. Do you know whether the underwriters took up any rights and engaged in the layoff procedure which you have described?

A. Yes.

Q. Do you know how much stock was laid off?

A. Yes.

Q. How much was laid off, Mr. Emerson?

A. 103,170.

Q. Do you know the price at which it was laid off?

A. There were four layoffs, and they were at different prices. As the offering proceeded, the market weakened.

Q. And the layoffs were made at the market price, is that correct?

A. That is correct.

Q. Mr. Emerson, would you describe this issue of North American Aviation stock as a successful issue?

A. It was successful in that most of the stock was taken up by stockholders or those who purchased rights, and apparently pushed the market down quite a bit.

Q. How much, Mr. Emerson?

A. I can't answer that on the basis of this memorandum. At least, I have found no figures here that indicate that. It [fol. 199] does show that the first layoff was at 45½. The last one was at 42¾. Others were in between those prices.

Q. Do you know how long or whether this was accompanied by a general decline in the market?

A. I do not know.

Q. Do you know how long such depressing effect as may have existed lasted?

A. May I hear the question again?

Q. Yes, sir. Do you know how long such depressing effect as may have existed lasted?

A. I don't know.

Q. Will you state, Mr. Emerson, the approximate total value of this issue of North American Aviation stock?

A. It would be 1,145,011 shares times thirty-eight, the subscription price.

Q. That would be in excess of $40,000,000, would it not?

A. Yes.

Q. How long was it from the time the issue was first announced until the time it was completely sold?

A. I don't know. There is nothing here that indicates this.

Q. Does the exhibit show the amount of time between the offering price and the length of time the underwriting commitment was terminated?

A. The amount of time between what dates?

Q. The date of the offering and the date on which the underwriting agreement was terminated?

A. The underwriters? Yes, it does.

Q. What does that show, Mr. Emerson?

A. The underwriters signed their agreements on September 6, 1956. The rights were terminated September 24, 1956.

Q. What is the significance, Mr. Emerson, of the fact that the underwriters' agreement lasted this short period of time?

A. It didn't last a short period of time.

[fol. 200] Q. Is that a long period of time for an underwriting agreement to last?

A. This is a—the underwriting agreement must last beyond the date of the expiration of the rights, which in this case was September 24, and usually runs, as I remember it, forty-five days thereafter, and then terminates automatically.

Q. What is the general purpose of the agreement among the underwriters?

A. To state the obligations of the various underwriters; to give the powers to the manager that the manager must exercise; and also to give the manager the right to sign with the issuer on behalf of all the other underwriters.

Q. What is the purpose of the agreement with respect to prices of the stock?

A. I don't understand your question.

Q. Do the underwriters undertake any obligation to stabilize the market for the stock or to purchase stock on the market?

A. The underwriters give the manager the power of doing that within stated limits.

Q. Now, what is the reason for the fact that in this case, for example, the agreement terminated after a short or long period of time, as you wish, approximately 20 days?

A. I don't think the agreement terminated then. That is when the rights expired. The agreement, I presume, went on for some period beyond that.

Q. So that the underwriters continued to stabilize?

A. They could.

Q. Well, what is their obligation with respect to stabilization after that period?

A. They have no obligation at any time to stabilize except [fol. 201] insofar as the manager feels it is in the best interest of the offering. He can do it any time within the limits of the agreement given.

Q. So the underwriter at any time he feels there is an unduly depressive effect on the market price can stabilize, is that correct?

A. That is correct.

Q. Do you recall whether there was any stabilization in this North American issue of stock?

A. I do not recall.

Q. From your general experience, Mr. Emerson, is it usual to stabilize in rights offerings?

A. It is not usual.

Q. What is the reason for that, Mr. Emerson?

A. The subscription price is set below the market so that presumably the rights will have a value during the life of the right, which may be two weeks, three weeks, four weeks, as the case may be.

Q. In general terms, though, what is the value of the rights? Is it the difference between the offering price and the markt price?

A. In this particular case, the ratio of the offering was one share of new stock for six shares outstanding. To find the value of the right, you would subtract the subscription price from the then market price and divide by seven.

Q. How many rights are required to buy one share of stock?

A. Six.

Q. And is the value of six rights equivalent to the difference between the offering price and the market price?

A. Seven, because the stock at the beginning is cum rights.

Q. Will you explain what you mean by "cum rights"? I believe I know what you mean, but——

A. At the beginning of the offering, each share of stock has a right, and the Stock Exchange sets a day when the stock will go ex rights. It will then decline in price by, roughly, the equivalent of the right.

[fol. 202] Q. I would like to go on now to an issue of Standard Oil Company capital stock——

Mr. Bushby: Just a moment.

The Court: Do you wish to cross-examine on this one?

Mr. Bushby: I would like to complete the picture on it.

Mr. Bushby. The rights which you have here and in other typical offerings of issuers can be taken to a bank, can they not, and be borrowed on?

The Witness: I don't think the rights could be, but the resulting stock could be.

Mr. Bushby: And would that be without regard to the margin requirements?

The Witness: There is a special rule of the Federal Reserve Bank, Federal Reserve System, I guess, covering the margin requirements on new issues of stock, and the margin in that case is 25 per cent as against the normal margin on transactions which now, I think, is 90 per cent.

Mr. Bushby: That piece of mechanics and that ability to borrow is a very helpful feature, is it not, in the marketing operation?

The Witness: That is why it was arranged to make possible equity financing thru rights offerings.

Mr. Bushby: And equity financing, you mean, by issuers?

The Witness: Yes, sir.

Mr. Bushby: There is no such mechanics to facilitate a secondary, is there?

[fol. 203] The Witness: None whatever. The normal margin requirements would be applicable in that case.

Mr. Bushby: 90 per cent today.

The Witness: At present 90 per cent, yes, sir.

Mr. Bushby: There is nothing in this exhibit which is before you, Mr. Emerson, which shows whether dealers were left with this North American stock on their shelves, dealers as differentiated from underwriters?

The Witness: There is nothing to indicate that definitely.

Mr. Bushby: Do you happen to know from that standpoint whether this was a successful issue or not for the dealers?

The Witness: I assume that it was.

The unsubscribed stock, according to this, was sold at 40⅝. The subscription price was 38. So that the stock at the end of the subscription period was still above the subscription price, although it had started out materially higher. The first layoff was at 45½.

Mr. Bushby: Now in a rights offering by an issuer, the company in consultation with the underwriters, if any, has the right to fix any price it sees fit below the market to make the offering a success, is that correct? That is, when the offering is to be to stockholders.

The Witness: Yes. Presumably the underwriting group has got to agree or it won't sign the contract. In other

words, if the discount from the market were very tiny, the underwriter wouldn't go ahead.

Mr. Bushby: So the customers get a substantial discount so that the rights will be valuable.

The Witness: The intent is that the right will have [fol. 204] a value throughout the subscription period, barring very unusual adverse market changes.

Mr. Bushby: Now, in a secondary, there are no rights to be offered and the seller tries to get the highest price obtainable, is that correct?

The Witness: Yes, sir.

Mr. Bushby: It is quite a different operation.

The Witness: Oh, very different.

Mr. Bushby: Do you know whether the syndicate account here showed a profit or loss at the end of the operation? By syndicate account, I mean where the underwriters were buying and selling either rights or the stock?

The Witness: I see no such computation in this exhibit.

Mr. Bushby: So you don't know whether there was a profit or loss on the operation?

The Witness: No, sir.

Mr. Bushby: If your Honor please, I would like to renew my objection that these offerings of rights are really not probative in connection with the secondary, such as proposed by the Government in this case, and we are just going to flounder out into a morass if we have detailed testimony on these or on bond issues. I think we ought to confine this to secondaries.

The Witness: May I correct my previous testimony? I had not seen Page 4.

Mr. Bushby: Certainly.

The Witness: There was a net loss transferred to the underwriters of somewhat over $16,000.

[fol. 205] By Mr. Reycraft:

Q. Mr. Emerson, when a company comes to your firm in order to raise capital, do you generally discuss with them the various ways in which new capital can be raised?

A. Generally, yes.

Q. Is it a regular practice for your firm to be asked for its advice as to means by which new capital should be raised?

A. In many cases, yes. Sometimes the issuer knows quite definitely what type of capital they want raised, and do not seek our advice.

Q. Do you make recommendations from time to time as to whether they should finance through debt offerings or equity offerings?

A. Yes, sir.

Q. And from time to time do corporations employ one means and then the other?

A. Do they what?

Q. Do they switch from one to the other?

A. I didn't get that.

Q. Well, for example, would it be unusual for a corporation to have a rights offering one year and a debt offering a year later or two years later?

A. No, it would not be unusual.

Q. So there is an interplay between these two methods of raising new capital for corporations?

A. Yes.

Q. And it is a matter of choice as to which the company prefers to pursue in light of its own financing and its own desire, isn't that correct?

A. Yes. The market conditions would be a factor. The bond market might be good and the stock market poor, or the other way around. Also, even more important would be the company's present financial structure, whether it would be wise for them to incur more debt or not; whether [fol. 206] it was the type of business where it is speculative in its nature and it would be unwise for them to have any debt. You can't generalize.

Q. Would you consider such things as the going interest rate in making a recommendation with respect to debt financing?

A. Yes.

Q. As against the general market price available for common stock?

A. Well, we would be more apt to study the company and its needs from the point of view of steadiness of its operations and whether we felt that in the light of the company's, the nature of the companys business, it would

be wise for them to finance through equity or through debt. We would give more attention to that than we would to the going rate of interest.

Mr. Reycraft: I see. I have no further questions on this.

Mr. Bushby: Mr. Emerson, what you have been testifying to in the last few minutes about being consulted by issuers about debt or equity financing has nothing whatever to do with the secondary offering of the type the Government is proposing there, has it?

The Witness: Has nothing to do with it at all.

By Mr. Reycraft:

Q. Mr. Emerson, are you familiar with the Government's proposal to the extent that you know that it refers to rights?

A. Yes.

Q. Are you familiar with it to the extent that you would have an opinion as to the value which such rights should have in order to be useful?

Mr. Cox: May I inquire, Mr. Reycraft, what aspect of the Government proposal you are talking about?

[fol. 207] Mr. Reycraft: The Government proposal refers to the rights of certain stockholders to subscribe to stock, is that correct?

Mr. Cox: I don't understand that at all.

Mr. Reycraft: I will withdraw the question.

Mr. Bushby: Do you mean to say they can take the stock that belongs to Christiana, Delaware, and the Delaware shareholders, and issue rights to somebody else to subscribe to it? Are you proposing that?

Mr. Reycraft: No, sir.

The Court: The question is withdrawn.

By Mr. Reycraft:

Q. Are you familiar, Mr. Emerson, with the issue of common stock of the Standard Oil Company which occurred in November, 1957, and which involved six and a half million shares?

A. I remember that we managed a substantial offering of the Standard Oil Company of New Jersey at that time.

Mr. Reycraft: Mr. Emerson, I will be referring to a document as to which in the lower left-hand corner appear the numerals 520, 521, 522, and 523.

Mr. Tierney: Are you going to identify that?

Mr. Reycraft: Yes. I will ask that this be marked Government Exhibit 8, for identification.

(Thereupon said document was marked Government's Exhibit 8, for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, do you recall the approximate dollar value of the shares which were sold under this offering?

A. The subscription price is given here.

Q. Will you state what it is?

A. $44.00 a share.

[fol. 208] Q. Will you state the total dollar amount of the subscription?

A. Well, it would be 44 times six million——

Mr. Cox: I am in a position to supply the figure if the witness can't. I have $288,161,000.00.

By Mr. Reycraft:

Q. Do you adopt that answer, Mr. Emerson?

A. I accept that.

Q. Will you describe, Mr. Emerson, the period of time it took to complete this offering of rights?

A. Agreement among underwriters was signed November 7, 1957. The rights expired December 18, 1957. There was unsubscribed stock offered December 23, 1957.

Underwriters undoubtedly began soliciting orders when the registration statement was filed, which would have been three weeks ahead of November 7, 1957.

Mr. Bushby: If the Court please, I would like to make the same objection to this line of testimony, on this particular offering, because it was an offering by an issuer and not a secondary.

Mr. Tierney: I join in that, your Honor.

The Court: Let the record show the objection.

Mr. Cowen: Your Honor, I would like to join in the same

objection. We think the only comparable ones are the secondaries. He is constantly bringing in other issues.

The Court: The objections are overruled.

By Mr. Reycraft:

Q. Mr. Emerson, in your judgment, was this rights offering a success?

A. As I remember it, it was.

[fol. 209] Q. Do you recall the amount of the value of the rights, that is, the amount below the market at which they were offered?

A. I do not, no.

Q. Do you know how far below the market the subscription price was?

A. I do not know.

Q. I refer you to Page 1 of this exhibit, which indicates the subscription price.

Does that refresh your recollection with respect to the subscription price?

A. I don't know what the market was.

Q. I refer you to Page 2 of this exhibit, which states the public offering price of unsubscribed stock. Was that stock offered at the market?

A. Substantially at the market, but that would have been after the termination of the rights, so that that offering took place on December 23rd, and the subscription price would have been set about November 7th.

Q. Do you recall whether the market for this stock declined during the period of the offering?

A. I do not know.

Q. You have testified, I believe, that in your opinion this was a successful offering?

A. Yes, sir.

Mr. Reycraft: I offer the exhibit relating to Standard Oil in evidence.

Mr. Bushby: Objection, if the Court please.

Mr. Cox: May it please the Court, to avoid a mechanical problem of objections, may it be understood that when an objection is made by one defendant, it is made by all, unless there is some disassociation?

The Court: That is the Court's understanding, that the objection of one defendant is adopted by all.

[fol. 210] Mr. Cox: I have just one or two questions that I would like to ask you, Mr. Emerson, about this offering.

This Standard Oil of New Jersey offering was made in 1957?

The Witness. Yes, sir.

Mr. Cox: In terms of the offering price, it was an offering in the amount of $288,161,000, is that right?

The Witness: Yes.

Mr. Cox: Did Standard Oil Company of New Jersey issue and sell on the market any common stock in 1956?

The Witness: It did not.

Mr. Cox: Did it in 1955, if you recall?

The Witness: No, they haven't for many years.

Mr. Cox: Is this the first common stock offering of this kind by Standard Oil Company of New Jersey in many years?

The Witness: To the best of my knowledge, it is the first common stock offering of the Standard Oil Company of New Jersey since our firm has been in business, and we started in 1935.

Mr. Cox: Having made this offering of $288,161,000 in 1957, did the Standard Oil Company of New Jersey make another offering of the common stock in 1958?

The Witness: No, sir.

Mr. Bushby: Do you know whether dealers were left with stock in connection with this offering?

The Witness: I don't know, offhand.

Mr. Bushby: Was the syndicate account a profit or loss in this case?

[fol. 211] The Witness: By "syndicate account," I assume you mean sale and purchase account?

Mr. Bushby. Yes, of rights, or stock.

The Witness: There was a profit.

Mr. Bushby: Were a large number of rights purchased by the syndicate in this case?

The Witness: Yes, sir.

Mr. Bushby: How many?

The Witness: 19,440,755.

Mr. Bushby: And there are no rights involved in the secondary offering, such as the Government is proposing here, is that correct?

The Witness: That is correct.

Mr. Dallstream: If your Honor please, may I ask one question?

The Court: You may.

Mr. Dallstream: Mr. Emerson, do I understand that in this issue involving 6,549,124 shares, 99.18 per cent of the shares were taken by the shareholders themselves?

The Witness: From what page are you reading?

Mr. Dallstream: Page 1.

The Witness: Not necessarily from shareholders themselves; shareholders and those who bought rights from shareholders, yes.

Mr. Dallstream: And the underwriters were only required to pick up 82/100 of one per cent of the issue?

The Witness: That is correct.

Mr. Dallstream: Do you know at what price the public market had been at the time this deal was negotiated?

The Witness: No, sir.

[fol. 212] Mr. Dallstream: As distinguished from the time it was publicly announced?

The Witness: I do not know.

Mr. Dallstream: There was, however, a substantial spread in this case, was there not, between the market price and the offering price?

The Witness: Yes, sir.

Mr. Dallstream: And was that price, in your opinion, sufficient to make it attractive for the shareholders themselves to purchase?

The Wtiness: The shareholders did purchase, yes.

Mr. Dallstream: And they woud have suffered a dilution of their stock interests had they not purchased?

The Witness: That is correct.

Mr. Dallstream: In that sense, these initial public offerings are very different from the secondary, in that in a secondary a shareholder, by not buying, does not lose any position or interest in the company?

The Witness: That is correct.

Mr. Dallstream: That is all.

The Court: The exhibit will be received in evidence.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit No. 8.)

Mr. Reycraft: I will refer next to a document which bears in the lower left-hand corner the number 528 and which con-

sists of Pages 528—27 is the next number—529, 530, 531, and 532. It is headed "6,549,124 shares, Standard Oil Company, Incorporated, of New Jersey."

May we have this marked for identification, please?

[fol. 213] (Said document was marked as Government's Exhibit 10, for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, will you describe the document which I have just handed you?

A. It is a list of the underwriters in the case of the Standard Oil Company equity offering; showing the amount of shares they underwrote and the number of shares that they purchased as dealers on lay-offs.

Q. Do you know where that document came from?

A. I assume it came from our files.

Q. Will you refer to the number in the lower left-hand corner to see if that means anything?

Those numbers were put on by people in your firm.

A. I would accept it as from our files.

Mr. Reycraft: I offer this exhibit in evidence in further explanation of the foregoing document.

Mr. Bushby: The same objection, if the Court please.

Mr. Tierney: Some objection.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit No. 10.)

Mr. Reycraft: I will refer next to a document entitled "Analysis of distribution of 701,621 shares of Standard Oil Company, Incorporated, of New Jersey."

This document bears in the lower left-hand corner the number 566.

Will the reporter please mark this document for identification as Government Exhibit 11?

(Said document was marked Government's Exhibit No. 11 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit for [fol. 214] identification No. 11. Will you describe that document, Mr. Emerson?

A. On large issues, we customarily ask the participants, both underwriters and dealers who participated in the distribution, to tell us, following a completion of the distribution, where they sold their stock and to what type of people. This shows the distribution of the 701,000 shares, which is made up of both lay-offs and unsubscribed stock, in the case of Standard of New Jersey issue, and shows how much was sold in each State and to what general type of customer.

Q. Is it the regular practice of your company to make up documents such as this?

A. On large issues, yes.

Q. On large issues, all right.

Mr. Reycraft: I offer Government's Exhibit No. 11 for identification in evidence, in further explanation of the earlier document.

Mr. Bushby: Same objection.

The Court: The objectins are overruled.

Mr. Cox: May I ask a few questions, Mr. Emerson?

Mr. Emerson, will you explain to me a little bit about this document which has just been marked and received in evidence?

Are these share figures on the document?

The Witness: Yes, sir, except in the extreme right-hand column. In that case, they are per cents of the entire offering.

Mr. Cox: This accounts, in one way or another, for the distribution of the 701,621 shares that were distributed, is that correct?

The Witness: That is correct, both the layoff stock and the unsubscribed stock.

Mr. Cox: Now the second column from the left, above [fol. 215] the line, is headed the words "Insurance Companies," which run across both lines; then the word, "Life" is under that.

The Witness: Yes, sir.

Mr. Cox: Then the first entry is opposite, "California—300".

Does that mean that 300 shares were bought by the life insurance companies in California?

The Witness: That is correct.

Mr. Cox: And the total at the bottom at the foot of that column means that out of 701,621 shares only 9,919 shares were bought by life insurance companies?

The Witness: That is correct—1.41 per cent of the issue.

Mr. Cox: Of the total amount sold.

And this explanation you have given me would apply to the other columns across there?

The Witness: Yes, sir.

Mr. Cox: Thank you.

Mr. Tierney: Mr. Reycraft—if the Court please——

Would you mind making a statement as to what the relevancy of that document is?

Mr. Reycraft: Yes. It explains the distribution of this issue of stock, over a broad coverage, both geographically and with respect to the type of stockholders.

Mr. Tierney: Do you think that that will help the Court in determining the time or manner of the distribution?

I don't see why we should waste time putting in exhibits that have no bearing on the case.

[fol. 216] I object to it.

The Court: It is received in evidence.

Proceed.

Mr. Tierney: What have you done with Exhibit 10? Have you got Exhibit 10?

Mr. Reycraft: Exhibit 10 is the document which indicates the number of shares underwritten and the number of shares purchased.

Mr. Tierney: Then where is Exhibit 9?

Mr. Reycraft: We apparently skipped Number 9.

(Said exhibit, marked Government's Exhibit No. 11 for identification, was received in evidence.)

Mr. Reycraft: I will refer next to the document which bears the numbers in the lower left-hand corner 639, 640, 641, 642, 643, and 644.

This document is headed, "Title of Issue: Socony-Vacuum Oil Company, Incorporated", and above that the figure 3,180,188 shares.

Mr. Bushby: May I have the same objection to this line of testimony on this offering—that it is an offering by an issuer with rights and may extend to any exhibits offered in the course of this examination? I think it would save time.

The Court: Yes, you have a standing objection. You won't have to keep repeating it.

Mr. Tierney: We join in that objection, your Honor.

Mr. Cowen: The same, your Honor.

Mr. Reycraft: Will the Reporter please mark this document for identification as Government's Exhibit No. 12?

(Thereupon said document was marked Government's Exhibit 12, for identification.)

[fol. 217] By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit for identification No. 12. Will you state whether your firm managed or co-managed this issue of stock?

A. We managed it;

Q. Approximately how many shares were involved, or exactly, from the document?

A. 3,188,188.

Q. What was the total dollar value of this offering?

A. It would be that figure times $31.00.

Mr. Cox: My computation would be in the sum of $98,586,000.00.

By Mr. Reycraft:

Q. Mr. Emerson, in your judgment, was this issue of stock a successful issue?

A. I don't remember. I remember that there was one of the issues of Socony-Vacuum that we did not consider successful, and whether this is the one or not, I am not sure.

Mr. Reycraft: Will the Reporter please mark for identification as Government's Exhibit No. 13, a document which bears the numbers in the lower left-hand corner of 134 through—the numbers are in reverse, 133 and 132—132 through 134?

(Thereupon said document was marked Government's Exhibit 13, for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit for identification No. 13. Will you refer to that document and see if it refreshes your recollection with respect to the

Market price of Socony-Vacuum stock during that period; [fol. 218] and, after you have done that, will you express your opinion as to whether it was a success?

Mr. Cowen: Your Honor, I wonder if we could narrow down this word "successful"? I keep on hearing that the issue was successful, but I wonder "successful to whom"? If you mean successful to the underwriter, in that he got paid for what he did, that is one thing; but if you mean successful on the stock market, and that it went down, that is another. So I think we ought to narrow the word so that we understand it.

The Court: I thought that was previously explained as purchaser acceptance.

Mr. Cowen: It wasn't to me.

By Mr. Reycraft:

Q. Mr. Emerson, you have answered the question when I asked you whether it was successful. What did you mean by your answer that it was?

A. Well, I think I said in one case that it was successful from the point of view of the underwriters, but I didn't know whether it was successful from the point of view of the buyers or not. I am speaking from memory.

Q. Now, with respect to this particular issue I have asked you the same question, and will you answer the question with respect to the effect on the market generally whether the issue was successful?

Mr. Cox: May we have that question read back, please?

(Question read.)

Mr. Cowen: Your Honor, I don't think that what I said was quite clear.

[fol. 219] Successful from whose standpoint? If we mean successful from the underwriters' standpoint, that is one thing; if we mean the market went down 10 or 20 points, I can't see how it is successful.

The Court: Perhaps the witness can explain it.

What is your meaning when you say the issue was a "success"?

The Witness: When I am speaking from the point of view of the underwriter, sir, it means that the underwriters came out without a loss.

The Court: It has nothing to do with the buyer acceptance of the issue?

The Witness: No, sir.

The Court: Or the condition of the market?

The Witness: No, sir.

Mr. Cowen: May we understand then that your previous answers to all these questions of whether or not the issue was successful refer only to the underwriters' standpoint?

The Witness: I understand that was the way the question was raised.

Mr. Cowen: I just wanted to make it clear, because I didn't understand.

The Court: In other words, if you didn't lose any money, it was a success?

The Witness: Yes, sir, the way I have been answering the questions this morning.

The Court: Regardless of how much you make?

The Witness: No. I would modify that.

[fol. 220] You start out assuming that you are going to make a certain amount. You are paid an underwriting fee. Now if you lose a substantial part of that fee, but still come out with a black figure, I would say that the issue was not a success from the underwriter's point of view.

By Mr. Reycraft.

Q. Mr. Emerson, I assume that your firm is in this business for a profit?

A. Yes, sir.

Q. Is this the only consideration that you take into account in judging whether an issue is a success?

A. No.

Q. What other factors do you take into account, Mr. Emerson?

A. The taste it leaves with everybody.

Q. Will you explain that in more detail?

A. I can't I think it is evident.

Q. The taste it leaves with everyone. In your judgment, does that include the further effect on market price? For example, if the price of the stocks dropped 40 per cent, would you think that left a good taste with everybody?

A. No.

Q. So you do, apparently, take into consideration in

judging whether an issue is successful its further effect on market price?

A. You have asked about this particular issue. The market went down—let's see—it shows here that on the first of July the market was above 39. The agreements were signed September 25th. On September 25th the stock closed at 35⅛. The subscription price was set at 31, the stock went down during the period of offering to a low of 33, [fol. 221] which is only $2 above the subscription price. That was in spite of very heavy layoffs by the underwriters.

We found that rights were coming into the market from all over the country. We bought those rights and exercised them and laid the stock off; but I don't—I think this is the issue where we were quite badly scared.

Q. In your judgment, you were not very successful on this issue, is that correct?

A. I would say that from the point of view of the underwriters coming out with a profit, it was successful. From the point of view of the stockholders, it left a somewhat unfortunate taste.

Q. How long, if you recall, did this unfortunate taste last on the market?

A. Well, it is evident from this tabulation which you have given me, which is your Exhibit No. 13, that the stock had recovered hardly at all in the middle of November. That is as far as it goes.

Mr. Reycraft: I will refer next to a document which bears in the lower left-hand corner the number 168, and which has on the top the date October 24, 1952, a letter addressed to B. Brewster Jennings, Esq., Socony Vacuum Oil Company, Incorporated, 26 Broadway, New York, New York.

Mark this document for identification as Government's Exhibit 14.

(Said document was marked Government's Exhibit No. 14 for identification.)

[fol. 222] By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit No. 14 for identification. Will you read the first paragraph?

A. "Now that your capital stock financing has been brought to a successful conclusion, it occurred to me that

it might be of interest to compare the market action of your stock with that of other leading oil companies during the last few weeks. The attached table sets forth the market prices of selected oil stocks on September 25th (the day we signed the underwriting contract with you) and on October 23rd (the day we made payment for the unsubscribed stock).".

Q. Who is the author of that letter, Mr. Emerson?

A. I believe that that was—the initials or the signature looks like——

I can't read it, and I don't recognize it.

Q. May I see the exhibit?

A. Sure.

Q. Are those the initials "P. H."?

A. They could be.

Q. Is there a "P. H." who is associated with your firm?

A. There is a partner whose initials are "P. E. H." and he generally signed "P. E. H."

Q. Would you recognize his initials, if you saw them?

A. I think so.

Q. Do you believe those are his initials?

A. They don't look like it to me.

Q. Who is "P. E. H." by the way?

A. Perry E. Hall.

Q. What is his job with your firm?

A. Managing partner.

Mr. Reycraft: I will next refer to a document which bears in the lower left-hand corner the number 629.

[fol. 223] Mark this exhibit for identification, as Government's Exhibit 15.

(Said document was marked Government's Exhibit 15, for identification.)

By Reycraft:

Q. Mr. Emerson. I hand you Government's Exhibit No. 15 for identification. Will you describe it?

A. This is a tabulation that we keep in our office whenever we are heading a rights offering to stockholders to show progress of the offering during the subscription. It shows the number of rights we purchased for laying-off purposes, the amount of stock that had been laid-off as of this

date, the amount of subscriptions by stockholders, to the subscription agent.

Mr. Reycraft: I offer in evidence Government's Exhibits 13, 14 and 15, all relating to this issue.

Mr. Cowen: Does that include the document the witness failed to identify?

Mr. Reycraft: By initials?

Mr. Cowen: By initials.

Mr. Reycraft: Yes.

Mr. Cowen: I don't think that document has been identified properly for its introduction in evidence.

He said he didn't know whose signature it was.

By Mr. Reycraft:

Q. Mr. Emerson, is Mr. Hall in the courtroom?
A. Is Mr. Hall what?
Q. In the courtroom?
A. No, sir.

[fol. 224] Mr. Cox: Why don't I undertake, with Mr. Emerson's help, to find out, if I can, whose initials those are?

The Court: The Court will reserve its ruling.

The Clerk: The Court is about to recess for lunch. At the sound of the gavel, everyone is directed to rise and is to remain quietly standing until Judge LaBuy has left the Courtroom.

(Whereupon a recess was taken in the trial of the above-entitled cause to 2:00 o'clock, p.m. of the same day, Wednesday, February 18, 1959.)

[fol. 225] Before Hon. Walter J. LaBuy, Wednesday, February 18, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to recess.

Present: Same as before.

The Clerk: Case on trial.

The Court. Counsel may proceed.

SUMNER B. EMERSON, having heretofore been duly sworn, resumed the stand and testified further as follows:

Direct Examination.

By Mr. Reycraft:

Q. Mr. Emerson, I will refer next to a document which bears the number in the lower left hand corner of 42, and the attached document, number 43.

(Said document was marked Government's Exhibit No. 16 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, will you describe the material and the heading of this document?

A. It covers the registered secondary on June 14, 1955, 325,000 shares Warner-Lambert Pharmaceutical Company, common stock.

Q. What was the offering date of that, Mr. Emerson?

A. June 15, 1955.

Q. When was the issue completely sold?

A. This document does not say when it was completely [fol. 226] sold. The wholesaling was completed that day. The subscription books were closed June 15.

Q. At what time?

A. 12:14 a.m. I imagine that is an error, for p.m.

Q. What conclusion do you draw from the fact that the subscription books were closed approximately at noon on the day following the offering date?

A. It means that during the period when the issue was in registration dealers and underwriters were soliciting orders, and enough orders were obtained subject to the registration statement becoming effective so that on the day of public offering the wholesale demand to the syndicate was sufficient to exhaust the offering.

Q. Do you get any inference with respect to the completion of the retailing of this issue, or does the information on the document indicate anything with respect to the completion of the retailing?

A. There is nothing here that would indicate that.

Q. Did your firm manage this issue, Mr. Emerson?

A. Yes, sir.

Q. Do you know the size of the syndicate?

A. There were 74 underwriters and 66 dealers.

Q. On the first page of the document, the words "selling concession, $1.00" and "25 per cent reallowance" appear. Will you explain what those figures mean?

A. It means that to dealers we would offer the stock—the offering price for the stock to the public was 34⅜. We would offer to dealers at 34⅜ less $1.00. They in turn were allowed to sell to other dealers at 34⅜ less a quarter.

Q. Now, is the selling concession computed with respect to existing Stock Exchange commissions?

[fol. 227] A. It has some vague relationship to them, but it will vary materially with the issue.

Q. Is it generally a multiple of the Stock Exchange commission?

A. It is almost always more than the Stock Exchange commission.

Q. In this case, do you know what the multiple of the Stock Exchange commission was?

A. No, sir.

Q. Would you be able to express an opinion as to the general multiple of the Stock Exchange commission which is required on secondary distribution?

A. Well, it would vary so much, Mr. Reycraft. It would be more than one. It would usually be at least one and a half times the Stock Exchange commission. It might run up to three times the Stock Exchange commission.

Q. Now, when you fix the multiple at somewhere in the neighborhood of three times the Stock Exchange commission does this bear any relation to the difficulty of selling the offering?

A. Yes.

Q. And would a multiple of three indicate a difficult offering to sell?

A. It is probably higher than the average, but I wouldn't want to be categorical on it.

Q. It is higher than average, however.

Will you explain, Mr. Emerson, the source from which you get the basic Stock Exchange commission, that is, who sets that commission?

A. I don't understand the question.

Q. Well, who fixes the Stock Exchange commission?

A. Who fixes it?

Q. The commission which brokers charge for selling stock.

A. The Stock Exchange.

Q. And this is a uniform price, is that correct?

A. A minimum price, not a uniform price.

[fol. 228] Q. It is at least what they agree to charge, is that correct?

A. That is correct, and it varies from Stock Exchange to Stock Exchange.

Q. I see, but with respect to each stock exchange, it is the minimum uniform commission, is that correct?

A. I know only about the New York Stock Exchange. It is a minimum there. I assume it is in other stock exchanges, but I don't know that to my own knowledge.

Q. But you do know with respect to the New York Stock Exchange?

A. Yes, sir.

Mr. Reycraft: I will offer Government Exhibit No. 16 in evidence.

Mr. Cox: Mr. Reycraft, may we just, to have the record consistent, have the dollar amount of this offering?

Mr. Reycraft: Yes.

Mr. Cox: I make it out to be $11,170,000 on the basis of the offering price.

Mr. Bushby: Are you going to ask some more questions?

Mr. Reycraft: You may ask.

Mr. Bushby: Mr. Emerson, did your syndicate support the market on this issue of Warner-Lambert?

The Witness: You are asking did we?

Mr. Bushby: Yes.

The Witness: We entered a syndicate bid, but there were no stabilizing transactions.

Mr. Bushby: All right. In the case of a secondary offering such as Warner-Lambert, is it more expensive and more [fol. 229] difficult to support the market than in the case of a rights offering of stock by the issuer?

The Witness: I don't know. It would vary. Normally on a registered secondary you don't go ahead until you are fairly sure that you are going to be able to move at least the bulk of the offering.

In other words, you don't fix your price until just before the offering, and if the underwriting group has not been successful in developing orders, they just wouldn't go ahead.

Mr. Bushby. Well, what I am referring to was the rights. There are no rights in a secondary?

The Witness: There are no rights in a secondary.

Mr. Bushby: Do you not support the market in the case of a rights offering by purchasing rights rather than purchasing stock?

The Witness: I wouldn't say that you supported a market, but you remove from the market the impact of rights that would otherwise be pressing on it. It is not technically a stabilizing transaction under the rules of SEC, but it certainly has the same effect.

Mr. Bushby: And that is cheaper to do than to have to buy stock in a secondary offering where there are no rights?

The Witness: Yes, sir.

Mr. Bushby: And on the occasion of the Warner-Lambert secondary offering, the purchaser from you or from your dealers could take that stock and go into a bank and borrow on it, could he not?

The Witness: Yes.

Mr. Bushby: But under current margin requirements, [fol. 230] he would have to put up 90 per cent of the price?

The Witness: That is correct. In other words, he could borrow 10 per cent only.

Mr. Bushby: Now in the case of an original issue or rights offering by a corporation, the purchaser from you or from your dealers could go into a bank and borrow on a good deal more, could he not?

The Witness: If he were in possession of rights, either as a stockholder or through purchase, and when exercising those rights, he could borrow 75 per cent; so he would be putting up 25 per cent.

Mr. Bushby: Instead of 90 per cent?

The Witness: That is correct.

Mr. Bushby: In the case of a secondary offering such as Warner-Lambert, the money does not go into the corporation whose stock is sold, is that correct?

The Witness: None of this money went to the Warner-Lambert Company.

Mr. Bushby: So there is no statement in the prospectus that states this money is going to be employed as capital or for any other purpose to generate more earnings?

The Witness: That is correct.

Mr. Bushby: Now, in the case of an offering by an issuer to stockholders, there is a prospectus which has a paragraph about purpose of issue, is there not?

The Witness: Yes, sir.

Mr. Bushby: And ordinarily that states that the money is going to be plowed into some project by the corporation, hopefully to make more money for those stockholders?

The Witness: Yes, or it may take the place of money [fol. 231] that has already been plowed in and borrowed from the bank, so that the effect is the same.

Mr. Bushby: It is the same. All right.

Mr. Tierney: We object to this exhibit, your Honor, for the reasons indicated.

The Court: The objection is overruled. It is received.

(Said exhibit, marked Government's Exhibit No. 16, for identification was received in evidence).

By Mr. Reycraft:

Q. Mr. Emerson, with respect to your testimony on the margin requirements for rights, after the rights are exercised and the stock is sold to the ultimate purchaser who actually buys the stock, what are his requirements as to margin?

A. He has to put up 90 per cent and he can borrow 10.

Q. So that ultimately when the stock is finally sold, to the extent we can say it is finally sold on a rights offering, it is to a person who is subject to the general margin requirements, is that correct?

A. The only people that get that special provision are those who are holding rights and exercising them. Then if they exercise the rights and resell the stock to another individual, which I think is what your question means, the second individual who is buying it would have to, under the present margin requirements, borrow 10 per cent and put up 90.

Q. Is there a good deal of activity by persons who are speculating, not in the critical sense, but persons who are

engaged in arbitrages, in purchasing rights and selling to the ultimate purchaser?

A. Yes.

[fol. 232] Q. So that primarily those persons who do exercise rights subject to these margin requirements, other than the original stockholders who get the rights, are people engaged in this business as a full-time business, is that correct?

A. Not necessarily. The people who would exercise the rights would be, first, the stockholders who want to exercise them; second, it would be individuals or institutions who bought rights in the open market and prefer to buy the stock through buying rights and exercising the rights; the third would be the arbitragers that you have spoken of; and the fourth would be the syndicate itself who bought rights in the open market, exercise them and laid off the resulting securities.

Mr. Bushby: But just to make this plain, Mr. Emerson, on the margin requirements, any body exercising rights and buying the stock, he can continue on the 25 per cent basis?

The Witness: Indefinitely, to the best of my knowledge.

Mr. Bushby: Indefinitely. It is only when it goes to a second step that he gets under the 90 per cent?

The Witness: That is my understanding of it, yes, sir.

By Mr. Reycraft:

Q. In order that I may be clear, as I am not sure I understand, is it your testimony that the person who borrows money to buy rights and then exercises them himself to buy the stock continues under the lower margin requirements, or does he come under the 90 per cent requirements?

A. No, no, he would, if he exercised the rights himself, come under the 25 per cent margin requirements.

[fol. 233] Q. In other words, by buying rights, he can purchase it for 25 per cent, he can purchase the stock ultimately for 25 per cent margin, is that correct?

A. That is correct; he can borrow 75 per cent.

Mr. Cox: Mr. Emerson, what is an arbitrager?

The Witness: An arbitrager is one who buys the security

and sells either the same security or one related to it almost simultaneously to make a small profit. They do it in large volume. They do it almost at the same time or try to do it almost simultaneously, so that they are not taking a market position.

In the case referred to here, an arbitrager would be one who bought rights of an offering, exercised those rights, and simultaneously sold the stock on the New York Stock Exchange or whatever stock exchange it was wherever it was traded.

Mr. Reycraft: I will next refer to a document which bears in the lower left-hand corner the number 121, dated June 16, 1955, and the heading "Warner-Lambert Pharmaceutical Company," and it indicates the volume of trade of that stock.

(Said document was marked as Government's Exhibit No. 17 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit No. 17—I believe that is No. 128 in the lower left-hand corner. It is almost illegible.

Mr. Cox: 128.

The Witness: 128 or 129.

By Mr. Reycraft:

Q. Mr. Emerson, will you describe this document?

[fol. 234] A. Well, it is a list of transactions in Warner-Lambert Pharmaceutical Company on an unnamed date.

Q. Will you refer to the date at the top of the page?

A. The report was typed June 16, 1955 but there is nothing to indicate what date it applies to.

Mr. Reycraft: I will refer next to the exhibit which bears in the lower left-hand corner the number 138 and the date in the upper right-hand corner is June 10, 1955.

Mr. Tierney: Does that have an exhibit number?

Mr. Reycraft: It is 138 I haven't had it marked as yet.

(Said document was marked as Government's Exhibit No. 18 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit No. 18 for identification, and will you describe that document?

A. This again is a list of transaction on an unnamed date, transactions in Warner-Lambert Pharmaceutical stock, presumably on the New York Stock Exchange.

Q. What is the date in the upper right-hand corner?

A. June 10, 1955.

Mr. Reycraft: I will refer next to the document with the number 136 in the lower left-hand corner, and the date June 13, 1955, in the upper right-hand corner. We will mark this as Government's Exhibit No. 19.

(Said document was marked as Government's Exhibit No. 19, for identification.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit No. 19, and will [fol. 235] you describe that document, Mr. Emerson?

A. This again is a list of transactions in Warner-Lambert Pharmaceutical Company presumably on the New York Stock Exchange, giving the times and prices, and again on an unnamed date, although this was typed June 13, 1955.

Mr. Reycraft: I will next refer to a document with a notation in the lower left-hand corner 134, and with the date June 14, 1955, in the upper right-hand corner.

Will you mark this as Government's Exhibit No. 20?

(Said document was marked as Government's Exhibit No. 20, for identification.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit No. 20, Mr. Emerson, and will you describe that document?

A. This again is a list of transaction showing times and prices, presumably on the New York Stock Exchange, and the date in the upper right-hand corner is June 14, 1955.

Mr. Reycraft: I will refer next to a document with the number 132 in the lower left-hand corner, and the date June 15th in the upper right-hand corner.

Will you mark this as Government's Exhibit No. 21?

(Said document was marked as Government's Exhibit No. 21 for identification.)

By Mr. Reycraft:

Q. Will you describe Government's Exhibit No. 21, Mr. Emerson?

A. This again is a list of transactions giving times and prices of Warner-Lambert Pharmaceutical Company. It also shows bid and offered prices at various times on an unnamed day.

[fol. 236] Q. What is the date in the upper right-hand corner?

A. June 15, 1955.

Q. Mr. Emerson, these documents were obtained from your company's files: Would you ascertain for us whom you have time——

A. From what company's files?

Q. Your company's Morgan Stanley's.

Would you ascertain for us the dates for which those quotations are given, at your convenience?

A. Yes.

Mr. Reycraft: I will next refer to a document with the notation "130" in the lower left-hand corner, and the date June 15th in the upper right-hand corner.

Will the reporter please mark this as Government's Exhibit 22 for identification?

(Said document was marked Government's Exhibit No. 22 for identification.)

By Mr. Reycraft:

Q. Will you describe Government's Exhibit No. 22, Mr. Emerson?

A. This is a memorandum put in our files to the effect that a specialist in Warner-Lambert stock on the New York Stock Exchange had told us that at no time during the trading hours on June 14, 1955, was it necessary to show the stabilization bid we had placed on the floor.

Q. What is the significance of this document, Mr. Emerson, in relationship to the Warner-Lambert offering?

A. It shows that we placed a stabilizing bid on the floor of the New York Stock Exchange and that we gave it to

the specialist to execute, and he did not find it necessary to execute it.

Q. In other words, the price did not go down to that bid price, is that correct?

A. To whatever the bid price was.

Q. Whatever the bid price was?

A. Yes, sir.

Mr. Reycraft: I will next refer to a document which [fol. 237] consists of four pages, 754 to 757, which refers to 648,696 shares of Johns Manville Corporation, and it bears the date October 1, 1956.

Will you mark this as Government's Exhibit 23 for identification?

(Said document was marked Government's Exhibit No. 23 for identification.)

Mr. Reycraft: I offer Government's Exhibit 22 in evidence.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 22.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit 23 for identification. Will you please describe that document?

A. This is a memorandum made by our Syndicate Department, covering the pertinent accounting facts relating to the offering of 648,696 shares of Johns Manville Corporation common stock.

Q. Did your firm manage this issue?

A. Yes.

Q. Does the document indicate the number of shares which were laid off in this issue, or were any such shares laid off?

A. Yes.

Q. Will you state the number of shares laid off?

A. 32,525.

Q. And at what price?

A. At three different prices: Some at $45.50; some at forty-five and three-quarters, and some at forty-six and three-eighths.

Q. Does the document indicate the market prices on the date of those lay-offs?

A. No, sir.

Q. Would they have been laid off at the market price?

[fol. 238] A. Closely related to the market price.

Q. Closely related to the market price?

A. Yes.

Mr. Reycraft: I offer Government's Exhibit 23 in evidence.

Mr. Tierney: If the Court please, we object. This is a primary offering, rights offering; it has no materiality to the issue here.

The Court: You have a standing objection.

Mr. Tierney: All right. Thank you.

The Court: It is admitted.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit No. 23.)

Mr. Reycraft: The document with the notation in the lower left-hand corner, "737" and the date October 18, 1956, in the upper right-hand corner, is the next exhibit.

Will the reporter please mark this as Government's Exhibit 24 for identification?

(Said document was marked as Government's Exhibit No. 24 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit 24 for identification. Will you describe it?

A. This is a sheet that is made out and sent around to the various partners of our firm when we are heading an underwriting of an offering to stockholders to show the progress, the amount of rights that have been bought, the amount of stock that have been laid off, the subscription that have been made.

Q. Does this document bear the words, "Final Report"?

A. Yes.

[fol. 239] Q. What does it indicate to you, sir?

A. It indicates that 98.98 per cent of the offering was taken up by stockholders, or those who purchased rights, including the underwriting group, and that the balance of 1.02 per cent would have been unsubscribed stock and delivered to the underwriters.

Q. May I see it?
A. Yes.

Mr. Reycraft: I offer Government's Exhibit No. 24 in evidence.
The Court: It is admitted.

(Said exhibit, marked Government's Exhibit No. 24 for identification was admitted in evidence.)

Mr. Cox: Mr. Emerson, can you tell us, in the case of the Johns-Manville offering that you have been testifying about, what the percentage discount was from the market price on the contract date?
The Witness: I can, in some cases.
Mr. Cox: I am asking you about Johns-Manville, will you tell us about that? Do you have anything with you that would refresh your recollection on that?
The Witness: I do not have the data on Johns-Manville.
Mr. Cox: May I have this marked as Defendant du Pont Exhibit 1 for identification?

(Exhibit so marked.)

Mr. Cox: May it please the Court, this is a document in Mr. Reycraft's possession, which he took from the files of Morgan Stanley, which bears a number in the lower left hand corner, "383", I think. It is headed, "Comparison of Underwritten Industrial Common Stock Offerings to Stockholders", $15,000,000 and over, and is dated August 20, 1957.

Mr. Emerson, I ask you to examine Defendant's Exhibit [fol. 240] 1 for identification and see if there is anything in that document that refreshes your recollection as to the amount of the discount below the market price in the Johns-Manville case.
The Witness: Yes, sir. The market price on the day the contract was signed was 48⅛; the subscription price was 40; and there was a discount of 17½ per cent.
Mr. Cox: Mr. Emerson, this morning you were asked some questions about the offerings of stock of American Can, North American Aviation, and the Socony Vacuum Oil Company.
I am going to give you Defendants' Exhibit for identification No. 1 again and ask you on the basis of that exhibit to

answer some questions that I want to ask you about those issues involved there.

With that before you, does it refresh your recollection so that you can tell me what the percentage discount from the market price was in the case of an offering of the stock of American Can Company?

The Witness: On the date that the contracts were signed, American Can sold 30⅞, and the subscription price was 26¼, with a discount of 15 per cent.

Mr. Cox: Can you tell me what the discount was in the case of the stock issue by North American Aviation?

The Witness: The subscription price was 38—the market at that time was 48⅜—and the subscription price—with a discount of 21½ per cent.

Mr. Cox: Can you give me the same information for the Socony Mobil issue in 1952?

[fol. 241] The Witness: It was Socony Vacuum at that time.

Mr. Cox: Socony Vacuum.

The Witness: The subscription price was 31; the market at that time, at the time of the signing of the contracts was 35⅛; and the discount was 11.7 per cent.

Mr. Cox: Can you give us the same information for the issue of stock by Standard Oil Company of New Jersey that you testified about this morning?

The Witness: The subscription price was 44; the market at that time was 52⅝; and there was a discount of 16.39 per cent.

Mr. Cox: Mr. Reycraft, did we get the dollar figure on the last one into the record?

Mr. Reycraft: No, I will be glad to have it.

Mr. Cox: That was Johns-Manville issue, 1956. I make it out to be $26,000,000.

Mr. Tierney: What was your last remark, Mr. Cox?

Mr. Cox: I get the amount of the Johns-Manville on the basis of the offering price as $26,000,000.

Mr. Bushby: Mr. Emerson, you have just testified about a discount on these rights offerings in various amounts. You used the market price to figure the discount percentage on the date of the contract signing?

The Witness: Yes, sir.

Mr. Bushby: But had not the market in all those cases

already gone off to some extent in anticipation of the offering?

The Witness: In most cases, yes.

Mr. Bushby: So that the true discount is really more?

The Witness: The impact of the issue would be larger.

[fol. 242] Mr. Bushby: The impact was more than the indicated discount.

The Witness: You shouldn't measure the impact against the subscription price. The market had gone down under the impact of the issue in most cases prior to the signing of the contracts, and the contracts were then signed at a discount of these figures which were given from the then existing markets.

Mr. Bushby: Right. Thank you.

By Mr. Reycraft:

Q. Mr. Emerson, you have been questioned concerning discounts on rights offerings. I believe in one case you indicated a discount of 15 per cent, is that correct?

A. I don't remember.

Q. Would you examine du Pont Exhibit No. 1 and refresh your recollection with respect to any one of those discounts that you have referred to?

A. Yes, sir.

Q. Will you examine what the value of the right was in relation to that discount price?

A. Well, to take the first one covered in the testimony so far, that of American Can, the market price is 30⅞. The subscription price was 26 and a quarter, so there was a difference of 4⅝ points, and you would divide 4⅝ points by 11.

Q. The rights retain a value, do they not?

A. If the market justifies it.

Q. In that case, did the market justify it?

A. This would be the initial value. Then what happens afterward——

Q. When the rights expire, they have no value, correct?

A. After they expire they have no value, and they may have no value before they have expired, if you misjudge the market or the market goes against you.

[fol. 243] Q. As to any of those issues, in your knowledge, did that happen?

A. Well, many of these were issued by other underwriting houses. It did not happen on any issue that we underwrote.

Q. Do you know of any issue which Morgan Stanley ever underwrote as to which this happened?

A. No, not by name. I suspect it may have happened, but I can't identify one.

Q. You don't know of any issue?

A. I do not.

Mr. Reycraft: I will go on to the Royal Dutch Petroleum issue, and refer next to a document which bears the number in the lower left-hand corner 258.

Will you mark this document as Government's Exhibit No. 25 for identification?

(Said document was marked as Government's Exhibit No. 25, for identification.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit No. 25 for identification. Will you describe that document, Mr. Emerson?

A. This is a record of the purchases of rights by Morgan Stanley for the account of the underwriters in the offering of 7,602,285 shares of Royal Dutch Petroleum stock.

It shows the purchases of rights in the United States and the purchases in Europe and the average prices and the share equivalents.

Q. Is this a document which was prepared for the use of partners in your firm?

A. In don't know why this was prepared, but it does show the transactions that took place and the shares laid off.

Q. In the lower left-hand corner the name "P. M. Saint Germain" appears. Will you identify Mr. St. Germain?

[fol. 244] A. He is a member of our staff.

Q. Did he prepare the exhibit?

A. He must have.

Mr. Reycraft: I offer Government Exhibit No. 25 into evidence.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 25.)

Mr. Reycraft: I refer next to a document which bears the number 259 in the lower left-hand corner, also relating to Royal Dutch Petroleum issue.

I will ask that this be marked Government Exhibit 26 for identification.

(Said document was marked as Government's Exhibit No. 26 for identification.)

By Mr. Reycraft:

Q. Mr.Emerson, do you know the total dollar amount of this issue of Royal Dutch?

A. No. I think I may have it here.

Q. I believe we could get it.

A. $228,069,000.

Q. I hand you Government's Exhibit 26 for identification. Will you describe it, please?

A. It shows the prices, high, low and closing prices of Royal Dutch stock, and the rights on the New York Stock Exchange commencing January 17—I assume that would be 1957 or 1958—and ending February 10th. It also shows the Dow-Jones industrial average closing prices on those days, and the price on the Amsterdam Exchange, both for the common stock and rights converted from guilders into dollars.

Q. Does this exhibit cover the period of the rights offerings?

A. I don't know.

Q. Do you have some notes there that would indicate [fol. 245] - whether it does or not?

A. Well, I have nothing to indicate when the rights expired.

Q. Do you have the offering date?

A. The offering commenced on January 17th which was the first date covered here.

Mr. Reycraft: I offer Government Exhibit No. 26 in evidence.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 26.)

Mr. Reycraft: I refer next to a document with the number 260 in the lower left-hand corner, which is a graph.

I will ask that this be marked Government's Exhibit No. 27 for identification.

(Said document was marked as Government's Exhibit No. 27 for identification.)

By Mr. Reycraft:

Q. Will you describe Government Exhibit No. 27, Mr. Emerson?

A. It is a graph showing subscriptions to Royal Dutch stock broken up by various nations in which subscriptions were accepted, and excluding subscriptions by Morgan Stanley and Company for the account of the underwriters.

Mr. Reycraft: I offer Government Exhibit No. 27 in evidence.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 27.)

The Witness: Did this come from Morgan Stanley files? [fol. 246] Mr. Reycraft: These are your numbers, sir, in the lower left-hand corner. It did.

The Witness: I question if it was prepared by Morgan Stanley.

Mr. Reycraft: Will you find that out for us, sir?

The Witness: I can ask. I don't know that anybody would know at this time.

Mr. Reycraft: All we can do is ask, I suppose.

The Witness: All right.

Mr. Reycraft: I refer next to the document with the number 261 in the lower left-hand corner.

I will ask that this be marked Government Exhibit No. 28 for identification.

(Document so marked.)

By Mr. Reycraft:

Q. Will you describe Government Exhibit No. 28, Mr. Emerson?

A. It is a chart showing the market action of stocks of the Standard Oil Company of New Jersey, of Socony Mobil Oil, of International Business Machines, and of Royal Dutch during their respective subscription periods. It is not shown in dollars, but in per cent of the closing market of the respective stocks on the day that the discount was settled.

Q. In the column on the left-hand side, which begins on the bottom 80 and goes up to 90, 100, 110, and 120, the percentage column?

A. Yes.

Q. And on the graph lines with respect to each of these issues, are the numbers indicating the market prices?

A. Well, it doesn't—I don't know what figures you mean, sir.

They show only the market prices of Royal Dutch, and [fol. 247] only those in New York. They do not show prices in Amsterdam which were consistently lower.

Q. Will you describe the movement of the prices during the period of the offering of Royal Dutch?

A. According to this chart, using as a base the closing market price of the common stock on the day the discount was settled.

Q. Which day was that, sir?

A. The day the discount was settled—I have never heard that expression before.

Q. I don't understand it.

A. I am sure this was not prepared by Morgan Stanley and Company. We would never have used that expression.

Mr. Cox: I think, Mr. Reycraft, if it was not prepared by Morgan Stanley, there is some question in my mind whether the witness ought at this time be asked to explain it. I find it very puzzling, myself.

By Mr. Reycraft:

Q. Mr. Emerson, this document was obtained from your files. Will you find out for us as to the source of this document, if you please, and whether it was prepared by your company?

I will withhold offerings the document until you do find out about it.

A. All right.

Q. I will refer next to the document which bears the numbers 262 in the lower left-hand corner.

Will you mark this for identification as Government's Exhibit No. 29?

(Document so marked.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit for identification No. 29. Do you know whether that document was prepared [fol. 248] by Morgan Stanley?

A. I do not know, but I would doubt it.

Q. Your same reservation applies with respect to this graph as to the preceeding two?

A. Yes.

Mr. Reycraft: We will reserve that until you have had an opportunity to check with respect to each of them.

Do you care to ask any questions?

Mr. Cox: I would, on this issue.

Mr. Emerson, could you tell us what the discount on the market price on the contract date was in the case of this Royal Dutch?

The Witness: You mean the discount of the subscription price from the then market?

Mr. Cox: Yes.

The Witness: The subscription price in the United States was 30. The closing market at that time was 38⅜. The discount was 21.83 per cent.

Mr. Cox: Do you know anything about the business of the Royal Dutch Petroleum Company?

The Witness: Yes, sir.

Mr. Cox: What does that company do?

The Witness: It is a holding company.

Mr. Cox: Where is its head office?

The Witness: It is split between The Hague and London. I think technically it is in The Hague. It is a holding company for other companies that are operating companies in the international petroleum field, and in substantially every case the Royal Dutch Company owns 60 per cent of these holding companies and the Shell Transport and Trading, if I have its name correct, owns 40 per cent.

[fol. 249] Mr. Cox: Those are the so-called operating companies you have mentioned, companies that are engaged in some aspect of the petroleum business.

The Witness: Yes, sir.

Mr. Cox: Do you know where the operating companies for the most part operate?

The Witness: All over the world.

Mr. Cox: Mr. Emerson, for example, in Government Exhibit No. 26, you have some figures here from the Amsterdam Exchange, and you have computed those figures into United States dollars at a parity rate of one guilder to twenty-six and some odd cents. This is a peculiarity of this issue that you should have material here with respect to foreign exchanges and foreign prices. Why was that true in this issue?

The Witness: Well, this company is an international company. It is incorporated in Holland. It has stockholders that are scattered all over Europe and in the United States, so that when they decided to make an offering to their own stockholders, they found it necessary or wise, at least, to have subscription agents in, as I remember it, the Netherlands, England, France, Belgium, and Switzerland, and the United States. I may have one of them wrong.

Mr. Cox: Do you recall whether any substantial part of the stock offered in this offering was subscribed to by the exercise of rights by persons who lived in Europe or other foreign countries?

The Witness: A very large part of it.

Mr. Cox: Do you know how much of it?

The Witness: Offhand I do not, unless it is in some of these exhibits.

[fol. 250] Mr. Cox: Your Honor, I have no intention of renewing the objection which we have made, but I can't forbear to point out to your Honor how remote we are now getting from the situation before the Court.

I assume that the Antitrust Division does not propose in this case that control of General Motors should be peddled through the stock market of Europe.

By Mr. Reycraft:

Q. Mr. Emerson, do you know what percentage of the offering of Royal Dutch stock was sold in the United States?

A. Offhand, I do not.

Q. You don't have any idea what the percentage is?

A. I would rather not guess, because I don't know.

Q. Do you have any notes with you, Mr. Emerson, which would disclose that information?

A. No.

Q. Will you find out for us, sir?

A. Will you state your question exactly?

Q. Yes, sir. What percentage of the stock which was sold pursuant to the rights offering in Royal Dutch, which we were referring to, was sold within the United States?

A. What do you mean by sold in the United States?

Q. I mean rights were exercised by persons residing within the United States.

A. Does that include the rights exercised by the underwriting group?

Q. Yes, sir, if they sold it within the United States.

A. They sold it through dealers, who sold it all over the world.

I don't know how to get an exact figure.

Q. You can get a figure, however, with respect to the number of rights which were exercised by underwriters in the United States?

A. Yes, and I think that is in the material that was used [fol. 251] as an exhibit when you questioned me in New York.

Q. We will offer that at a later date, then.

Was this a particularly difficult offering to manage, Mr. Emerson?

A. Particularly difficult?

Q. Yes, sir.

A. Well, it was extremely involved because there were underwriters in Europe who were asked to sign an American form of underwriting agreement, which was totally difficult from anything they had ever seen before.

They could not participate, as I remember it, in stabilization transactions in this country without making themselves subject to the Securities and Exchange Act, which they didn't want to do.

From the point of view of working out the details of the underwriting, it was very complicated.

Q. Was this offering like any issue your firm had ever handled before?

A. We had never had an offering before where there was a large group of foreign underwriters, including in this case sub-managers.

Q. But you were able, nevertheless, to handle it successfully?

A. We worked it out, yes, sir.

Q. When you get a new and difficult problem, such as this, are you generally able to work out arrangements to handle it?

A. We always try to, but we don't always succeed.

Mr. Reycraft: I will refer next to a document which bears the numbers 314 and 315, Allied Chemical and Dye Corporation.

I will ask that this be marked as Government Exhibit No. 30 for identification.

[fol. 252] (Said document was marked as Government's Exhibit No. 30 for identification.)

By Mr. Reycraft:

Q. I hand you Government Exhibit No. 30. Will you describe it, Mr. Emerson?

Mr. Bushby: If your Honor please, Mr. Reycraft has now started on an entirely new line, that is, issue by a corporation of debt securities.

I think this can have no relevance whatever to the secondary sale of General Motors stock by du Pont or Christiana as proposed by the Government.

As Mr. Scanlon testified here yesterday, people who buy such debt securities are a different group of people than those who buy equities and stocks. The whole operation is different, and I really think we are far afield if we go into these issues.

The Court: Will Counsel explain the relevancy?

Mr. Reycraft: Your Honor, the question has been raised with respect to the ability of General Motors to engage in any financing during any secondary distribution which might ensue from this proceeding, and I think that the ability of corporations to raise large sums of capital through debt offerings is relevant.

We will show, as we go into these documents further, that the General Motors Corporation itself has raised a very large sum of capital through debt.

This is another example of the ability of a corporation to do that.

The Court: The objection is overruled.

[fol. 253] Mr. Reycraft: I offer Government's Exhibit No. 30 in evidence.

Mr. Tierney: If the Court please, just to keep the record straight, the objection of General Motors to the Government plan is that it will not be possible for them to raise capital except at an excessive cost—that is equity capital we are talking about. With this overhang of stock over the market, it would be difficult to ever raise any capital by the sale of any stock. That is what our objection is.

With that statement, I thoroughly agree with Counsel that is way beyond——

Mr. Cox: To make our position clear, so that Mr. Reycraft doesn't misunderstand, I don't believe anyone on our side has ever suggested that if the Government's plan should be adopted, it would put any substantial or insurmountable obstacle in the way of General Motors ability to raise capital by debt financing, mortgages or debentures.

The contention has been, as Mr. Tierney says, it would prevent the company from raising money by equity financing.

So if this is offered to prove that General Motors can raise money by debentures, you can rest easy on that issue. We haven't raised it, Mr. Reycraft.

Mr. Tierney: Otherwise it has no materiality at all.

Mr. Reycraft: It seems to me that certainly it shows the virtually unlimited ability of General Motors or any other corporation to raise money through debt, if necessary.

Mr. Tierney: I can even borrow money if I have sufficient [fol. 254] security. There is no problem of raising the money.

Mr. Reycraft: I would like to refer next to the document which bears the number in the lower left-hand corner "361," two pages, and the second page "362," American Telephone & Telegraph Company.

Mark this as Government's Exhibit 31, for identification.

(Thereupon said document was marked Government's Exhibit 31, for identification.)

By Mr. Reycraft:

Q. Will you describe Government's Exhibit No. 31 for identification, Mr. Emerson?

A. It is a memorandum from our Syndicate Department file, covering the offering of two hundred million American Telephone Company, 21-year, 2¾ per cent debentures, due 1971.

Q. What is the interest rate which was paid on those debentures?

A. 2¾.

Q. How long did it take to sell this——

A. I haven't the remotest idea.

Q. (Continuing)—to complete the underwriting?

A. I have no idea.

Q. Does the document indicate the date the subscription books were closed?

A. It indicates that the subscription books were closed January 31, 1950.

Q. When did they open sir?

A. That was the day of the offering.

Q. In other words, all of this—the underwriting was completed on the day of the offering, is that correct?

A. The underwriting was completed, yes.

Q. Now, on this first page of this document, after the [fol. 255] words, "spread" appears the words, "management fees", "purchaser", then "selling concessions", then the total .367 per cent.

Would you describe that figure or state what it is?

A. It means that the spread between the price our group paid the company and the price that we hoped to get in offering the bonds was .367 per cent.

Q. What was the face value of these bonds?

A. Two hundred million.

Q. Of each individual bond?

A. A thousand dollars, or it would be the normal amount. I presume they came in large denominations.

Q. How much does this indicate the spread was in each $1,000?

A. $3.67 gross.

Q. It costs $3.67 gross to sell a $1,000 bond?
A. That is correct.

Mr. Reycraft: I offer Government's Exhibit 31 in evidence.
The Court: It is admitted.

(Said exhibit, marked Government's Exhibit No. 31 for identification, was admitted in evidence.)

Mr. Bushby: I take it that we have a standing objection on these debt issues?
The Court: Yes.
Mr. Cox: Mr. Emerson, in Government's Exhibit 31 for identification there is an entry that says, "Purchase Price, 100.2999."
Strike that. Let me ask this: Who paid that price?
The Witness: The purchase price?
Mr. Cox: Yes.
The Witness: Our group.
[fol. 256] Mr. Cox: You bought these bonds?
The Witness: Yes, sir.
Mr. Cox: How did you buy them?
The Witness: At competitive bidding.
Mr. Cox: Sealed competitive bids?
The Witness: Yes.
Mr. Cox: What procedure is followed when bonds are sold that way? How is it done?
The Witness: The company announces that on a certain day it will receive bids for a given number of bonds, in this case two hundred million bonds. It probably doesn't set the coupon rate at that time, and it probably left the setting of the coupon rate to the underwriters. It would impose limitations. The customary limitations on telephone financing are that the bid must be equal to the face value or 100 per cent and must not be above whatever the figure is; and if you wanted to bid above that, you would change the coupon rate by an eighth and bid a lower price.
They announce the time and place at which they will receive bids; they announce the amount of deposit, the good faith deposit that the underwriting group must make; they announce where documents can be obtained, bidding documents, copies of the registration statement, and so forth; and then on the agreed date, at the agreed time, anyone can

go in that has the money to put up a good faith check and is willing to make a commitment for the whole two hundred million and make a bid.

Mr. Cox: And does the seller corporation choose the bid which it is to accept?

The Witness: Yes, it generally accepts the bid that gives it the lowest cost.

[fol. 257] Mr. Cox: In your experience, is it common and usual for secondary offerings of common stock to be sold by sealed competitive bids?

The Witness: I would say almost never, particularly those that would have to be registered.

Mr. Cox: Is there any reason for that?

The Witness: It is an unsatisfactory way of doing business.

Mr. Cox: Why is it unsatisfactory?

The Witness: Well, unsatisfactory to the underwriters, you mean?

Mr. Cox: To whom did you mean that it was unsatisfactory?

The Witness: I mean that it is very unsatisfactory to the underwriters to do business by competitive bids, because they don't know whether they are going to get the business or not; they go to a great deal of work preparing for something that they may never buy; they are unable to judge the market as well on an issue sold competitively for the simple reason that the institutions who are the potential buyers don't know who is going to make the offering and they won't give any information.

The distributing power of the financial community, nationwide, is split up; it doesn't all get behind one issue. It is split up into as many groups as there are bidding.

Mr. Cox: Are there any reasons from the point of view of the seller why sealed bids would not be a satisfactory way of making a secondary disposition of common stock?

The Witness: Of common stock?

[fol. 258] Mr. Cox: Yes.

The Witness: Well, it is very difficult to know what the market is going to be at the time your offering is going to be made.

There have been some cases of competitive sale of small amounts of common stock, particularly by—oh, executors,

where they felt that legally they had to have competition, which showed that they had received the highest bid. I think there have been some cases of sales——

You are speaking of secondary offerings?

Mr. Cox: Secondary offerings of common stock.

The Witness: Those are the only cases that I know of, and they have been very rare.

Mr. Bushby: They are not registered issues, Mr. Emerson?

The Witness: I have never known of a registered secondary where there was competitive bidding. I can't say it has never happened, but I don't happen to recall it.

Mr. Cox: You mean a secondary, registered, that was sold by a sealed competitive bid?

The Witness: Yes.

The Court: The Court stands recessed for ten minutes.

(A short recess was thereupon taken.)

Mr. Reycraft: If your Honor please, before proceeding with Mr. Emerson's testimony, we have several tables which were prepared and which have been exhibited to defense counsel some time ago. We intend to offer them in evidence. [fol. 259] They were prepared by our economist. He is in the building, but I understand the defendants do not require that he testify.

I wonder if I might just go ahead and identify them, and offer them, with no objection?

The Witness: Could I correct one bit of testimony?

Mr. Reycraft: Go ahead, sir.

The Witness: I said that I knew of no registered secondary that had been sold by competitive bidding. There were two that I know of that I didn't think of at the time, both sold by the Alien Property Custodian. One was the stock of the Schering Corporation, and the other was Rohm & Haas.

Thank you.

Mr. Reycraft: We will mark for identification Table 1 as Government's Exhibit No. 32.

(Thereupon said document was marked Government's Exhibit 32, for identification.)

Mr. Reycraft: I offer Government's Exhibit No. 32 in evidence.

Mr. Tierney: What have you done with 31?

Mr. Reycraft: Government Exhibit No. 31 is the AT&T. I offer Government's Exhibit No. 32 into evidence.

Mr. Bushby. I would like to object. I think it is not only irrelevant, but positively misleading.

Does your Honor have a copy before him?

The Court: No, I do not.

Mr. Bushby: It is simply a bundle of figures purporting to show savings in banks and insurance companies.

The Court: Is the purpose of this to show amounts available for investment?

Mr. Reycraft: Yes, your Honor, it is.

[fol. 260] Mr. Bushby: Banks can't invest in stocks; banks can't buy stocks; savings banks can't buy stocks, and we just had testimony about the insurance companies.

Mr. Tierney: If the Court please, there is no indication that anybody that has any savings account has the least interest in buying this stock we are talking about unless it was at such a bargain—he has left out piggy banks here.

Mr. Reycraft: If Mr. Tierney will furnish those figures, we will put those in.

Mr. Tierney: It is wholly irrelevant how much money is around. The question before your Honor, and we ought to get back to it some time, is the Government's plan, proposed to you, as to how they are going to dispose of the General Motors stock that is involved in this case, not what the debentures—what experience issuers have had with debentures, or how much savings there are.

There isn't anything here, your Honor, to indicate one dollar of all of these savings that has the least interest in what the Government proposes.

The Court: Does anybody know what percentage of all this money is available for investment?

Mr. Reycraft: I don't believe anyone in the world does, no.

The Court: Well, the Court will receive it.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit No. 32.)

Mr. Reycraft: Table No. 2 will be marked for identification as Government's Exhibit No. 33.

[fol. 261] (Said document was marked as Government's Exhibit No. 33 for identification.)

Mr. Reycraft: Government's Exhibit No. 33 is Table 2 entitled "New Corporate Securities Offered for Cash Sale in the United States, 1948-1957; Estimated Gross Proceeds Classified According to Type of Security."

We offer Government's Exhibit No. 33 in evidence.

Mr. Bushby: I would like to object to Exhibit No. 33 on the ground that it is immaterial and irrelevant to the issues before this Court and there isn't any indication of any relationship between the figures on this exhibit and the proposed sale by the trustee of the General Motors stock now owned by du Pont.

Mr. Tierney: We join in that objection.

The Court: It is received in evidence.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 33.)

Mr. Cox: I rise, may it please the Court, not to object but to ask Mr. Reycraft if he can explain some things to me about this exhibit. It is headed "Estimated Gross Proceeds." Can you tell us how the estimate was made? I am not objecting to it.

Mr. Reycraft: I would be glad to call our economist who prepared it, if you wish. It was my understanding according to our discussion that you didn't wish him to appear.

Mr. Cox: I don't want him, but I thought maybe you could explain it.

Mr. Reycraft: I would rather have our economist explain it.

[fol. 262] Mr. Cox: I don't want you to have to do that. Maybe you can find out and explain it to us tomorrow.

Mr. Reycraft: I will be glad to explain anything you want.

The Court: That would be hearsay, wouldn't it?

Mr. Cox: At this point, your Honor, I am prepared to take almost anything.

Mr. Reycraft: If I wanted to do it, it would be hearsay, your Honor.

Table 4 is entitled "Dollar Volume (Annual Basis) of Common and Preferred Stock Sales Effected on Registered

Securities Exchanges in the United States During Ten-Year Period 1948-1957."

Will you mark this as Government's Exhibit No. 34?

(Said document was marked as Government's Exhibit No. 34 for identification.)

Mr. Reycraft: I offer Government's Exhibit No. 34 in evidence.

Mr. Bushby: I should like to object again that it is irrelevant and immaterial in this case. Not only that, but there are sales of preferred stocks lumped in with common, and we have nothing to do with preferred stock in this case. It doesn't show how much is common, and there is no showing what stocks they were, whether railroads, utilities, industrials. It certainly doesn't show anything about du Pont or General Motors.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 34.)

Mr. Reycraft: Table 5 is entitled, "Asset Growth of [fol. 263] Non-Insured Corporate Pension Funds, 1920-1957," and I will ask this be marked as Government's Exhibit 35.

(Said document was marked as Government's Exhibit No. 35 for identification.)

Mr. Reycraft: I offer Government's Exhibit No. 35 into evidence.

Mr. Cox: Again I am not rising at this point to object, Mr. Reycraft, but could you tell us—the estimated assets for the end of the year increased in a five-year period, and do you know what the asset figure represents, is that book value?

Mr. Reycraft: I will be glad to call our economist, Mr. Cox.

Mr. Cox: Can you tell me? This has a book value, down here, and up here it doesn't say book value. Do you know whether that means there is any difference?

Mr. Reycraft: I believe it means book value in both cases.

Mr. Bushby: I would like to register an objection, again, that it is irrelevant and immaterial, not indicating in any

way the funds available for the purchase of the General Motors shares.

Mr. Tierney: We join in that objection.

The Court: Overruled.

(Said exhibit, marked Government's Exhibit No. 35 for identification, was received in evidence.)

Mr. Reycraft: Table No. 6 is entitled, "Non-insured Corporate Pension Funds Distribution of Assets by Type," and I will ask that this be marked as Government's Exhibit No. 36.

(Document so marked.)

[fol. 264] Mr. Reycraft: I offer Government's Exhibit No. 36 in evidence.

Mr. Tierney: The same objection.

Mr. Bushby: I object on the same basis.

The Court: The objection is overruled.

(Said exhibit, marked Government's Exhibit No. 36, for identification, was received in evidence.)

Mr. Reycraft: Table No. 7 is entitled, "Receipts and Expenditures of Noninsured Corporate Pension Funds, 1951 through 1957." This will be marked as Government's Exhibit No. 37.

(Document so marked.)

Mr. Reycraft: I offer Government's Exhibit No. 37.

Mr. Tierney: Objection.

Mr. Bushby: Same objection.

Mr. Tierney: Would it necessitate a call to your economist to tell us what you mean by expenditures on this table?

Mr. Reycraft: I would like to have any explanation of the charts come from the economist Mr. Tierney.

The Court: Is this objected to, I presume?

Mr. Tierney: Yes, your Honor.

Mr. Bushby: Yes, your Honor.

The Court: Overruled.

(Said exhibit, marked Government's Exhibit No. 37 for identification, was received in evidence.)

Mr. Reycraft: Table No. 8 is entitled, "Noninsured Corporate Pension Funds, Purchases and Sales of Common Stock, 1951-1957." We will mark this for identification as Government's Exhibit No. 38.

(Exhibit so marked.)

[fol. 265] Mr. Reycraft: I offer into evidence Government's Exhibit No. 38.

Mr. Bushby: Same objection.

Mr. Tierney: Same objection.

The Court: Overruled.

(Said exhibit, marked Government's Exhibit No. 38, for identification, was received in evidence.)

Mr. Reycraft: Table No. 12 is entitled, "Number of General Motors Stockholders by years, 1948 through 1957."

Would you mark this as Government's Exhibit No. 39 for identification?

(Document so marked.)

Mr. Reycraft: I offer Government's Exhibit No. 39.

Mr. Tierney: We are not going to object to this. We are interested in the Court knowing how many people are going to be affected by your proposed plan.

The Court: It is received in evidence.

(Said exhibit, marked Government's Exhibit No. 39, for identification, was received in evidence.)

Mr. Reycraft: Table No. 14 is entitled, "E. I. du Pont de Nemours and Company," and then it states, "the income per share of common stock, disposition of net income per share of common stock and retained earnings per common share stated as percentage of income, and income per common share."

I will ask that this be marked for identification as Government's Exhibit No. 40.

(Exhibit so marked.)

Mr. Reycraft: I offer Government Exhibit No. 40 into evidence.

[fol. 266] Is there any objection to Government Exhibit No. 40?

Mr. Bushby: Yes, I object to it.

Mr. Cox: I think that is a du Pont table of dividends?

Mr. Reycraft: No.

The Court: Is there any objection to this one.

Mr. Bushby: No, not to Exhibit 40.

The Court: It is admitted.

(Said exhibit, marked Government's Exhibit No. 40 for identification, was received in evidence.)

Mr. Reycraft: The next table, is entitled, "List of Occasions during 25-year period, 1933 through 1957 when equity securities and convertible bonds have been publicly offered in amounts of $50 million and over."

I will ask that this be marked for identification as Government's Exhibit 41.

(Exhibit so marked.)

Mr. Reycraft: I offer Government's Exhibit 41.

Mr. Cox: I am sure there will be objections, but before there are, Mr. Reycraft, I would like to call your attention to two errors on the face of the exhibit.

In the entry, Mr. Reycraft, that has to do with American Viscose Corporation, which is five lines down, Morgan Stanley was not the sole manager. It was co-manager or joint manager with Dillon Reed. I think the face of the exhibit should be corrected.

Mr. Reycraft: We will check that.

Mr. Cox: Further down in the same column, I think this [fol. 267] has to do with Standard Oil Company of New Jersey under the heading, Type of Transaction, the exhibit says "offer to shareholders."

The underlying material indicates there was an offer of exchange to shareholders of the International Petroleum Corporation.

Mr. Reycraft: We would be glad to check that.

Mr. Bushby: I object to this as being out of order. I thought it was understood this morning that to put in testimony regarding any of these sales of securities we were to have the manager of the syndicate here as a witness.

Here is another short form of putting in information that may have no bearing whatsoever. We know nothing about the circumstances of the offer, what the market value was

at the time. We have no opportunity to find out from the manager.

I think this shouldn't go in any more than those papers this morning unless we have the manager here.

Mr. Reycraft: This is a general exhibit, your Honor, as it indicates, and it starts with 1937—it goes back even further than that—in order to give a complete picture. I am not sure that we could find the manager, for example, of the Consumers Power issue in January, 1937. We would be glad to try, but we don't think it would help very much.

Mr. Tierney: Your Honor, I think your ruling this morning in response to an objection by counsel that necessitated putting Mr. Emerson on the stand is applicable again here.

Mr. Reycraft: I understood your Honor's ruling to be applicable to the Morgan Stanley documents.

[fol. 268] Mr. Tierney: I join in this objection. These are hardly ancient documents, and these companies are all in existence.

The Court: Who made this up?

Mr. Reycraft: A man by the name of Guy Hill, your Honor, who is an economist on the staff of the Antitrust Division, and the authenticity of this document is stipulated to, I understand. Is that correct?

Mr. Tierney: It is his work and he did it.

Mr. Reycraft: And have you checked it for accuracy?

Mr. Tierney: No, indeed.

Mr. Reycraft: They have had it for some time, your Honor, and it was submitted under the pre-trial order as indicated for checking. If they had any objections, we would be glad to meet them. We haven't had any, however.

Mr. Tierney: If we did check them, and found the dates and figures are accurate, we would still enter the same objection that Mr. Bushby made.

The Court: Is he available and could you produce him?

Mr. Reycraft: Yes, we could produce him.

Mr. Tierney: He doesn't know anything about it. He read a book and copied these figures out of a book. This morning your Honor sustained the objection which necessitated putting Mr. Emerson on the stand with respect to offerings of Morgan Stanley.

The same objection is repeated, and I think it is perfectly proper under all the circumstances.

Mr. Reycraft: Your Honor, the sources are given on the [fol. 269] second page of the document. In fact, much of the material came from the record of U.S. vs. Henry S. Morgan, et al.

Mr. Tierney: We weren't there, your Honor.

Mr. Reycraft: For the period 1950 to 1957, material is taken from the Commercial and Financial Chronicle. We have had no objections. The defendants have never pointed out a single error in the document, and if they would, we would be glad to make any changes indicated.

Mr. Bushby: We have no duty to check a thing like this. The economist made it out, got it out of a record of a case, and it is incomplete. It doesn't give the circumstances of these issues. We don't even know whether they were sold.

The Court: Well, I am afraid you will have to produce the man who made this up, counsel.

Mr. Reycraft: All right, your Honor. We will do that.

I would like to proceed now with a 2-page document, which bears the numbers 234 and 235, American Telephone & Telegraph Company.

I will ask that this be marked Government Exhibit 42 for identification.

(Said document was marked Government Exhibit 42, for identification.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit 42, Mr. Emerson, and will you describe it, please?

A. This is a memorandum from our Syndicate Depart- [fol. 270] ment covering the offering on October 29, 1957, of 250 million American Telephone & Telegraph 5 per cent debentures due 1983.

Q. Mr. Emerson, about halfway down the page, refering to the total spread, will you read that figure, please?

A. .53101 per cent.

Q. What is the face value of those bonds?

A. A thousand dollars.

Q. Does that indicate that it cost $5.31 to sell each one thousand dollar bond?

A. It represents the difference between what the underwriting group paid the company and what they tried to get on offer.

Q. Does it indicate what they actually got on the offering? That is, does the document indicate it?

A. It does not indicate that.

Q. Have you looked at the second page?

A. It would seem here that the entire issue was sold. This is the famous issue that was sold with the help of the Federal Reserve Bank.

The underwriter's were hopelessly stuck. They had sold about 20 per cent of the issue. That went on for a period of about a month. The Federal Bank changed its rediscount rate. The bond market changed, and in a half-hour the bonds were sold.

Q. Was it ultimately successful, Mr. Emerson?

A. Ultimately successful—with a gasp of relief from the underwriters.

Mr. Reycraft: The next document I shall refer to is a two-page document, bearing the numbers 351 and 352.

I will ask that this be marked Government's Exhibit 43, for identification.

(Thereupon said document was marked Government's Exhibit 43, for identification.)

[fol. 271] By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit No. 43. Will you describe this document.

A. Well, this shows prices of American Telephone & Telegraph 5's, beginning November 14, 1957, and running through December 6, 1957, due June, 1983.

Q. Did the prices go up or down, Mr. Emerson?

A. The prices went up. The Federal Reserve rediscount rate was changed late in the afternoon of November 14.

Q. And this issue had been offered before that time, is that correct?

A. Oh, it had been offered approximately a month before then.

Q. So this is merely a record from the time the Federal Reserve changed its discount rate?

A. Yes, that is correct.

Mr. Reycraft: I offer Government Exhibit 43 in evidence.

The Court: Any objection?

Mr. Tierney: Yes, your Honor, the same objection.

The Court: Overruled. It is received.

(Said document, so offered and received in evidence, was marked Government's Exhibit 43.)

Mr. Reycraft: I shall refer next to a two-page document which bears the numbers 139 and 140, General Motors Acceptance Corporation, 5-year 4 per cent debentures.

I will ask that this be marked Government Exhibit No. 44, for identification.

(Thereupon said document was marked Government's Exhibit 44, for identification.)

[fol. 272] By Mr. Reycraft:

Q. Mr. Emerson, can you describe Government Exhibit No. 44?

A. This is a memorandum prepared by our Syndicate Department covering the offering on June 11, 1953, of 150 million General Motors Acceptance Corporation 5-year 4 per cent debentures.

Mr. Reycraft: I will offer Government Exhibit 44 in evidence.

Mr. Tierney: Same objection.

The Court: Overruled. It is received.

(Said document, so offered and received in evidence, was marked Government's Exhibit 44.)

Mr. Reycraft: I would like to refer next to a 5-page document which bears the numbers 151, 152, 153, 154, and 155 in the lower left-hand corner.

I will ask that this be marked Government Exhibit 45 for identification.

(Said document was marked as Government's Exhibit No. 45 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, will you describe Government Exhibit No. 45?

A. This is a memorandum which shows the quotation over the counter of General Motors Acceptance Corporation 4's due 1958, beginnin June 10, 1953 and going through July 8, 1953.

Q. What is the significance of the period of time which the exhibit covers, Mr. Emerson?

A. I don't know why this was prepared. I assume just to show what the issue did marketwise, following its offering.

Q. This exhibit covers the period of time during which this exhibit was offered and the subsequent period to show [fol. 273] the price, is that correct?

A. Well, apparently the registration statement became effective on the afternoon, at 1:09 p.m. on June 10, 1953. Until then, of course, the underwriters could not make firm commitments to their customers. It shows the quotation in the market from then on, but I do not know what its significance is because I do not know why it was prepared.

Q. It was prepared by your firm, however, is that correct?

A. It looks like it. I wouldn't question it, although I do not know whose initials "D.J.C." are.

Q. Would you find that out for us, sir?

A. Yes.

Mr. Reycraft: I offer Government's Exhibit No. 45.

The Witness: I have a list of some of our employees here. Maybe I can identify it now.

Mr. Tierney: We object.

The Court: Overruled.

The Witness: It was prepared by Daniel J. Conroy.

By Mr. Reycraft:

Q. Is he an employee of your firm?

A. Yes, sir.

(Said document, so offered and received in evidence, was marked Government's No. 45.)

Mr. Reycraft: I shall refer next to a document which bears the number 127 in the lower left-hand corner.

Will the reporter please mark it for identification as Government's Exhibit No. 46?

(Exhibit so marked.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit No. 46, Mr. Emerson. Is that a document prepared by someone in your firm?

A. I am sure it is not.

Mr. Reycraft: I will offer it in evidence.

[fol. 274] The Court: It is received.

(Said exhibit, marked Government's Exhibit No. 46 for identification, was received in evidence.)

Mr. Reycraft: I shall refer next to a document which bears the number 128 in the lower left-hand corner.

Will the reporter please mark it for identification as Government's Exhibit No. 47?

(Document so marked.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit No. 47, Mr. Emerson. Was that prepared by an employee or a member of your firm?

A. I do not think so.

Mr. Reycraft: I offer Government's Exhibit 47.

The Court: It is received.

(Said exhibit, marked Government's Exhibit No. 47 for identification, was received in evidence.)

Mr. Reycraft: I shall refer next to a document which bears the numbers 78 and 79 in the lower left-hand corner, General Motors Acceptance Corporation, September 15, 1953.

Will you mark this document for identification as Government's Exhibit 48?

(Document so marked.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit 48 for identification. Will you describe it, please?

A. I couldn't hear you, sir.

Q. Will you describe it?

A. This is again a memorandum prepared by our Syndicate Department for accounting reasons covering the offer-
[fol. 275] ing on September 15, 1953, of 150 million General Motors Acceptance Corporation, 8-year, 3⅞ per cent debentures.

Does the document indicate how much it cost General Motors to sell each bond with a thousand dollar face value?

What was the face value?

A. A thousand dollars.

You mean General Motors Acceptance Corporation?

Q. Yes. What did it cost General Motors Acceptance Corporation to sell each of these?

A. One per cent.

Q. $10?

A. $10 on a thousand dollar bond. That was gross spread. Of course, they had their own registration expenses and their own counsel fees, and things of that kind.

Q. Would they be relatively small compared to the spread?

A. They would be less than half of the spread in all probability.

Q. Does the document indicate those expenses?

A. No.

Mr. Reycraft: I offer Government's Exhibit No. 48 in evidence.

Mr. Cox: May I ask a question?

Mr. Reycraft: Yes, sir.

Mr. Cox: Mr. Emerson, this document refers to the date of the prospectus. Was there a prospectus in connection with this sale of debentures?

The Witness: Yes, sir.

Mr. Cox: Would you have a copy of that in your file?

The Witness: Would we, in our files?

Mr. Cox: Yes.

The Witness: Yes.

[fol. 276] Mr. Cox: Those debentures were purchased from the General Motors Acceptance Corporation?

The Witness: Yes.

Mr. Cox: What is the General Motors Acceptance Corporation?

The Witness: The General Motors Acceptance Corporation is a subsidiary of the General Motors Corporation, formed for the purpose of aiding dealers and purchasers of their cars in financing the transaction.

Mr. Cox: How does it aid them?

The Witness: Loans them money.

Mr. Cox: It is engaged in lending money?

The Witness: Yes.

Mr. Tierney: I object to it, your Honor.

The Court: Overruled. It is received.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 48.)

Mr. Tierney: Will the reporter please read back Mr. Cox' questions and answers?

(Record read.)

By Mr. Reycraft:

Q. Mr. Emerson, returning for just a moment to the documents which have been identified as Government Exhibits Nos. 46 and 47, will you find out for us, if you can, whether these documents were prepared for your firm?

A. I will try to, yes.

I think you will have to give me copies, so that I can identify them.

Q. We will be glad to.

Mr. Reycraft: I will next refer to a 4-page document which bears the numbers 88, 89, 90 and 91, and bears the date of January 22, 1954, in the right-hand corner.

[fol. 277] Will the reporter please mark this for identification as Government's Exhibit 49?

(Said document was marked as Government's Exhibit No. 49 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, will you describe Government's Exhibit No. 49 for identification?

A. This is a list of quotations of the General Motors Acceptance Corporation, 3⅞, due 1961, commencing with the first market on September 15, 1953, and running through October 16, 1953, showing quotations at various times during the day and also certain transactions that we heard of.

Q. Was this document prepared by an employee or a member of your firm?

A. I assume that it was.

Q. Will you refer to the initials "J. E. F." on page numbered 91?

A. Yes.

Q. Do you recognize those initials?

A. John Friday.

Q. Is he an employee of your firm?

A. Yes.

Q. Does this exhibit No. 49 refer to the issue which is described in Government's Exhibit No. 48?

A. Yes.

Mr. Reycraft: I offer Government's Exhibit No. 49 in evidence.

The Court: Is there any objection?

Mr. Tierney: Yes, your Honor.

The Court: Overruled.

(Said document, so offered and received in evidence, was marked Government's Exhibit 49.)

Mr. Reycraft: I shall refer next to a document, a three-[fol. 278] page document, which bears the numbers 169, 170, and 171, in the lower left-hand corner.

Will you mark this document as Government's Exhibit 50, for identification?

(Thereupon said document was marked Government's Exhibit 50, for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit No. 50, for identification. Will you describe it?

A. A memorandum prepared by our Syndicate Department for accounting purposes, covering the offering of 75 million General Motors Acceptance Corporation, 2¾, due 1964, and 75 million 15-year, 3 per cent debentures due 1969.

Mr. Reycraft: I offer Government's Exhibit No. 50 in evidence.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Government's Exhibit 50.)

Mr. Cox: Are you finished with this one?

Mr. Reycraft: Yes.

I shall refer next to a document which indicates number 159 in the lower left-hand corner.

Will the Reporter please mark that document as Government's Exhibit 51, for identification?

(Thereupon said document was marked Government's Exhibit 51, for identification.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit No. 51, for identification, Mr. Emerson. Will you describe it?

A. This is an analysis of the distribution of 75 million [fol. 279] General Motors Acceptance Corporation, 10-year, 2¾, due 1964, and analysis of the ultimate sales, geographically and by types of buyers.

Mr. Reycraft: I offer Government's Exhibit No. 51.

Mr. Cox: Will you just let us look at this for a moment?

Are there two pages to this?

Mr. Reycraft: The next one is the 15-year issue. There are two—one for the 10-year, and one for the 15-year.

Mr. Cox: Have you offered both of them?

Mr. Reycraft: I shall.

The Court: They are admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit 51.)

Mr. Reycraft: I shall refer next to a document bearing the number 160 in the lower left-hand corner. It refers to the 15-year, 3 per cent debentures of General Motors Acceptance Corporation.

Will you mark that as Government's Exhibit 52, for identification?

(Thereupon said document was marked Government's Exhibit 52, for identification.)

Mr. Bushby: Your Honor, sometime before the session is over, I would like to correct, perhaps, a misunderstanding that might cause a man to be brought in from New York unnecessarily. It is about Government's Exhibit 41. This is the appropriate moment, I think, to bring this up.

The Court: Very well. Proceed.

Mr. Reycraft: I don't believe I understand that.

[fol. 280] Shall we discuss it later, or do you want to discuss it now?

The Court: Do you want to take it up with Counsel after adjournment?

Mr. Bushby: No. I think it has to be taken up with your Honor, whenever you want a break for a minute in offering these exhibits.

Mr. Reycraft: I will complete these first.

Q. I hand you Government's Exhibit 52 for identification. Will you describe that exhibit?

A. This again is an analysis of the sales of the 75 million General Motors Acceptance, 15-year, 3 per cent debentures, due 1969, geographically and by type of buyer.

Mr. Reycraft: I offer Government's Exhibit 52.

The Court: It is admitted.

(Said exhibit, marked Government's Exhibit No. 52 for identification, was admitted in evidence.)

Mr. Cox: Have you finished?

Mr. Reycraft: I am finished with that particular issue.

Mr. Cox: Do you have two copies of these?

The Witness: They are here.

Mr. Reycraft: He has the exhibits (referring to witness.)

Mr. Cox: Mr. Emerson, in the case of the analysis of dis-

tribution of the ten-year, 2¾ per cent debentures due July 15th, 1964, as I read that exhibit, 52 per cent of those debentures were bought by banks either for their own accounts or for the accounts of others, is that right?

The Witness: That is correct.

[fol. 281] Mr. Cox: And for that same issue, 13.49 per cent was bought by individuals, is that right?

The Witness: No, by savings banks.

Mr. Cox: By savings banks?

The Witness: Yes. It is exactly the same figure for both.

Mr. Cox: For both.

The Witness: Yes.

Mr. Cox: Now, directing your attention, for the purpose of comparison, to the analysis of distribution for the 15-year, 3 per cent debentures, due July 15, 1969, I call your attention to the fact that in the case of that issue, only 9.19 per cent of the issue appears to have been bought by individuals.

The Witness: Yes.

Mr. Cox: Is there any reason for that difference in those percentages that you know of.

The Witness: Different maturity period. I am questioning the accuracy of one of these figures. The total amount purchased by savings banks was 13,352,000, and that is shown as 13.49 per cent; and in the individual column, the total is 4,624,000, and that is also shown as the same percentage. I think there is an error in the figures.

Mr. Cox: Perhaps Mr. Reycraft or Morgan Stanley should re-examine these and see if there is an error.

Mr. Reycraft: I must say that I relied on Morgan Stanley's accuracy.

Mr. Cox: Would you look at these, or have someone check both of these exhibits?

The Witness: I think the figure for individuals under the 2¾ is obviously an error, because if the total is 4,000,624, out of 75 million, that would be nowhere near 13 per cent.

[fol. 282] Mr. Cox: I suggest, Mr. Reycraft, that we have a look at these exhibits and see what corrections have to be made, if you are agreeable to that.

Mr. Reycraft: I certainly am.

Mr. Bushby: If your Honor please, this morning certain exhibits were tendered and were excluded until the manager for the syndicate of the issue was put on the stand. Because they contain only partial information on an important point like this, we are entitled to examine them fully regarding the circumstances of the offering.

Now, by putting in this Exhibit No. 41 for identification, the same thing is accomplished by the Government, giving partial information on these issues, without having here a manager such as Mr. Emerson to testify here for the particular issue. Mr. Emerson is down here on a number, but he is not down for the others, and I do not think partial information regarding those should go in.

Now, the economist, as I understand it simply made this compilation from available documents. He doesn't have the other information that the managers of the syndicate have, and his coming here would not meet this objection that we made this morning.

As I understood it, the Court agreed with us.

Mr. Reycraft: He is here now, your Honor, to make it clear.

Mr. Bushby: You are not bringing him in especially?

Mr. Reycraft: He is here now.

Mr. Bushby: That will not meet the objection that I under-
[fol. 283] stand is joined in by other counsel.

Mr. Reycraft: I will next refer to the document which bears the numbers 308, 309 and 310, March 3, 1955, 250 million dollars, General Motors Acceptance Corporation debentures.

Will the reporter mark that as Government's Exhibit 53 for identification?

(Said document was marked as Government's Exhibit No. 53 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit No. 53 for identification. Will you describe it?

A. This is an analysis of the offering of 250 million dollars General Motors Acceptance Corporation, 5-year, three per

cent debentures, due 1960, which took place on March 3, 1955.

It is made up, I should say, of fifty million of five year debentures, and 200 million seven year, 3½ per cent, debentures.

Q. What was the interest rate on the $50,000,000?

A. Three per cent on the fifty million; 3½ per cent on the debentures, due 1972.

Mr. Reycraft: I offer Government's Exhibit No. 53.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 53.)

Mr. Reycraft: I refer next to a document bearing the number 301 in the lower left-hand corner.

[fol. 284] Will you mark it for identification as Government's Exhibit No. 54?

(Said document was marked for identification Government's Exhibit No. 54.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit 54. Would you describe it?

A. This is an analysis of the distribution, geographically and by type of buyer, of the offering of fifty million General Motors Acceptance Corporation five-year, three per cent, debentures, due April 1, 1960.

Mr. Reycraft: I offer Government's Exhibit No. 54.

Mr. Tierney: I would like to ask the witness a question, with respect to this exhibit, and also with respect to Exhibits 51 and 52.

Those are the analyses of the other two.

The Witness: Yes.

Mr. Tierney: I note under the column marked "Banks for Accounts or On Accounts of Others," on Exhibit 51, the percentage is 52.20 per cent, is that correct?

The Witness: Yes, sir.

Mr. Tierney: That indicates that the banks took more than half of that issue, is that correct?

The Witness: That is correct.

Mr. Tierney: On exhibit 52, under a like column, I notice the percentage to be 48.79, is that correct?

The Witness: That is correct.

Mr. Tierney: And on the last exhibit, I note under the same column 51.68 per cent.

The Witness: Yes.

[fol. 285] Mr. Tierney: So that in each of these instances the banks took about half of the offerings, is that correct?

The Witness: Either for themselves or others.

Mr. Tierney: What is the significance, if any, in that? Why does that happen, that banks are the ready customers of these debentures?

The Witness: Well, in the case of the three percent debentures, the five-year, three per cent, debentures, it was a short term bond, and I would imagine that many banks bought for their own account, as a short term investment.

Mr. Tierney: They are interested in the short term for their own accounts?

The Witness: Yes, sir. They would be more apt to be interested in a short term bond than any longer term bond.

Mr. Tierney: That is your explanation?

The Witness: And the balance of the buying would be for their trust departments and their agency accounts—things of that kind.

When we make a sale to a bank, we don't know whether it is for the bank's own account or for the trust department or pension department, or who it is for.

Mr. Tierney: It would indicate to me, being untutored in this business, that you have a client in the banks, which will take about 50 per cent of every one of these debenture issues.

The Witness: It did of these three, yes, sir.

[fol. 286] Mr. Reycraft: I refer next to a document which bears number 302 in the lower left-hand corner.

Will you mark it for identification as Government's Exhibit 55?

(Thereupon said document was marked Government's Exhibit 55, for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government's Exhibit 55, for identification. Will you describe it?

A. This is an analysis of a distribution, geographically and by type of client, of 200 million General Motors Acceptance Corporation, 17-year, 3½ per cent, debentures.

Mr. Reycraft: I offer Government's Exhibit No. 55 in evidence.

Mr. Tierney: Same objection, your Honor.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit 55.)

Mr. Cox: Have you finished with this?

Mr. Reycraft: Yes.

Mr. Cox: Mr. Emerson, may I ask you whether in selling a debenture issue or rather a short-term debenture, such as the 5-year debenture that is reflected in one of these exhibits, or the 17-year, 3½ per cent debenture, which is the subject of the last exhibit, is there any difference in the methods which Morgan Stanley follows in selling that kind of a security from the methods that you use in selling common stock when you manage common stock offerings?

The Witness: They are utterly different.

[fol. 287] Mr. Cox: In what respects are they different?

The Witness: In the case of bonds of this type, the buyers are very largely institutions. We would sell many of those institutions ourselves, retail.

Certain houses that are good on institutional buyers would take down from the syndicate large amounts of bonds, because they have that type of client.

Now with the common stock offering, many houses have a very limited ability to sell common stocks; other houses have a very great ability to sell common stocks, so that a given underwriting house might be a strong distributor of debentures and a very poor one of common stocks, or vice versa.

Mr. Cox: Is there a difference in the ultimate market to

which the two classes of securities go, in the sense that they are different kinds of purchasers?

The Witness: Yes. In the case of common stock offerings, a large part of them go to individual buyers, who are investing for their own account.

Now individuals buy very few corporate bonds. They are taxable, they are not interested in the yield that they can get on them, so that they are much more interested in buying common stocks. Institutions, on the other hand, are more interested in buying bonds.

Mr. Cox: Why are institutions more interested in buying bonds?

The Witness: Well, you take savings banks—until the last year or two they were not allowed to buy common stocks. They can only buy common stocks now in New York State—I don't know about the other States—only to a very [fols. 288-289] small degree. Life insurance companies, if they are going to do business in New York State—and most life insurance companies want to do business in New York State—have to substantially conform to the rules of New York State, the laws of New York State, on investment of funds. Only a very limited amount of the assets of a life company are allowed to be invested in the common stocks under the laws of New York. The same would be true of many other States.

The Court: It is time for adjournment.

(Whereupon an adjournment was taken in the above-entitled cause until Thursday, February 19, 1959, at 10:00 o'clock a.m.)

[fol. 290]

Transcript of Proceedings of February 19, 1959

The Clerk: United States vs. du Pont, et al., case on trial.
The Court: Counsel may proceed.

SUMNER B. EMERSON, a witness called on behalf of the Government, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued):

By Mr. Owens:

Q. Mr. Emerson, I hand you a document entitled "Subscription Offer, 904,314 shares of Aluminium, Limited, Capital Stock."

I ask that the reporter mark this for identification as Government Exhibit No. 56.

(Thereupon said document was marked Government Exhibit 56 for identification.)

Mr. Owens: The numbers on the document are 109 and 110, and these are documents furnished at the deposition of Mr. Emerson.

Excuse me, let correct that. The numbers apparently are 609 and 610, respectively, of the documents subpoenaed in connection with the deposition of Mr. Emerson.

By Mr. Owens:

Q. Have you had an opportunity to examine this document, Mr. Emerson?

A. Yes, sir.

Q. Would you tell us the nature of the commitment by the underwriters in connection with this offering?

A. There was no commitment from an underwriting point of view. The dealer managers agreed with the Aluminium Company to use their best efforts to form a group of dealers, including themselves, to procure subscriptions for the exercise of rights—through the exercise of rights.

[fol. 291] Q. What was the relative success of this issue, Mr. Emerson, insofar as you are able to discern that from the four corners of this document or from your recollection?

A. The entire offering was 904,314 shares of Aluminium common stock. The stockholders subscribed to 902,312. So that out of the nine hundred odd thousand shares, all but 2,000 shares were taken up.

Q. What is the significance of the statement on Page 2, "Number of Shares Unsubscribed, 2002," and the parenthetical expression, "Company did not offer these shares."?

A. Well, the company had made an offering to its stockholders, but there was no underwriting commitment. 2,002 were not taken up by stockholders. The company retained those in its treasury, I assume. At least, it did not sell them.

Q. Do you recollect the circumstances that gave rise to this issue?

A. No, sir.

Q. Are you in a position to state the reason or reasons why it was on a best efforts basis, as it appears to be, rather than on an underwriting basis?

A. I do not remember.

Q. Do you know what length of time elapsed between the opening of the subscription books and the closing of the subscription books with respect to this issue?

A. Well, the agreements with dealers were signed January 7, 1955. The rights expired January 31, 1955.

May I correct that? The soliciting dealers' agreement was dated January 10, 1955, so that the offering covered, I assume from this data, 21 days.

Mr. Owens: I ask that the reporter mark for identification document headed May 8, 1952, 989,599 shares American Can Company common stock.

[fol. 292] This also could be identified as number 719 through 722 of the documents marked with those numbers in connection with the deposition of Mr. Emerson.

(Thereupon said document was marked Government Exhibit 57 for identification.)

Mr. Cox: You are going to a different subject? Would you wait a moment?

Mr. Owens: At this time I request that Exhibit No. 56, which is the document with which I have just finished, be received in evidence.

The Court: Do the defense wish to question the witness about this exhibit?

Mr. Cox: I have a question, may it please the Court?

Mr. Emerson, directing your attention to Government Exhibit 56, I note on the face of that exhibit that the subscription price is shown as $47.60 per share, United States currency, and $46 per share in Canadian currency. Is that a correct reading?

The Witness: Yes, sir.

Mr. Cox: I also note that the agreement sighed with the company was January 7, 1955?

The Witness: Yes.

Mr. Cox: Can you recall or can you tell us what the market price in American dollars was for Aluminium, Limited on January 7, 1955? Do you have any recollection of that?

The Witness: I remember that it was substantially above the subscription price, but I do not remember how much.

Mr. Cox: Is your recollection precise enough to give us a percentage difference, an approximate percentage [fol. 293] difference, between the subscription price and the market price?

The Witness: I would rather not. My memory is not good enough on that.

Mr. Cox: If I should suggest to you that on January 7th the market price on the New York Stock Exchange of Aluminium, Limited, was at a high of 76 and a low of 75, would that refresh your recollection?

The Witness: I would have guessed that it was in the middle 70's, but I think that is correct.

Mr. Cox: That is all.

Mr. Burnham: Your Honor, we have the same objection to this that we had to the other rights offerings. May we have a standing objection to all exhibits relating to rights offerings, and the testimony as well?

The Court: Yes, you have a standing objection.

It is received.

(Said document, so offered and received in evidence, was marked Government's Exhibit 56.)

By Mr. Owens:

Q. With respect to the Government Exhibit marked for identification as 57, offering of American Can Company, does it appear on the face of that document that Morgan Stanley Company was a co-manager of that issue, Mr. Emerson?

A. That is correct.

Q. Will you tell us what the subscription price was with the rights that that offering entailed to the stockholders of American Can?

A. $26.25.

Q. And the offering date, sir?

A. May 8th, 1952.

Q. I think on the second page of that document there is an entry headed "Effectiveness of Articles 2 and 3 of the Agreements Among Underwriters Terminated."

[fol. 294] Do you know to what that refers when it speaks of "Article 2" and "Article 3," sir?

A. Yes, sir.

Q. Would you explain that, please?

A. Article 2 gives the managers certain rights in handling the offering for the underwriters. This is an agreement signed by the underwriters, addressed to the managers. It tells the managers what they may do for the accounts of the other underwriters in setting offering prices, in allocating stock, and various things of that type.

Article 3 gives the underwriters the privilege, within limits, of entering a stabilizing bid for the account of the underwriters.

Q. Are they the critical agreements among the underwriters during the subscription period?

A. They are the parts of the agreement that cover the offering, terms of offering, insofar as the underwriters are concerned. They give the managers the power to lay off, to buy rights; it tells how the commitment that managers enter into in purchasing rights is to be divided among the underwriters—things of that sort.

Q. When is the underwriting agreement terminated with respect to the ending of the effectiveness of those articles?

A. May 27, 1952.

Q. I note on the following line, "Agreement among underwriters terminated July 10, 1952 by limitation."

Would you explain what it means in the expression "by limitation"?

A. Yes, sir. When you sign an underwriting agreement, it is for a definite period; I think it is forty-five days.

Q. You mean in connection with the offering of subscription rights?

A. Yes.

[fol. 295] Or, rather, stock, with subscription rights?

A. In connection with this particular offer, the agreements were signed May 7th; they were to terminate July 10th. That would be a little over sixty days.

Q. Is such a limitation of the period of the agreement among underwriters common in connection with the offering of common stock by subscription rights?

A. It is standard for all offerings of any kind.

Q. A definite fixed termination date for the underwriting agreement?

A. Yes, sir.

Q. How is the duration of the agreement among underwriters affected by whether or not it is an offering of common stock, with subscription rights, as a regular offering of common stock to the general public?

A. I don't understand your question.

Q. With respect to the duration of the agreement among the underwriters, is there any difference in the duration of the agreement among the underwriters, depending upon whether or not it is a common stock offering to the general public or a common stock offering to the stockholders by the issuance of subscription rights to the stockholders of record?

A. As I remember our customary agreements, they run forty-five days from the period of offering. That would be in the case of a secondary or a bond issue. In the case of an offering by rights, it would run forty-five days from the date of the expiration of the rights.

Q. 45 days after the rights expired?

A. Yes. I haven't verified that by subtracting here, but I think that is correct.

[fol. 296] On page 3 of this document is an entry headed "Analysis of Trading."

Would you tell us what the purpose of that entry is and what it reflects, Mr. Emerson?

A. That shows that we bought for the account of the underwriting group an aggregate of 2,510,695 rights. We exercised those, subscribing to 251,069 shares, at the subscription price. That was stock that was laid off.

Q. Does that represent purchases in the open market of those rights?

A. Some of them would have been in the open market, and some of them not. Where the tabulation shows, "Plus Commission," it means they were bought on the New York Stock Exchange; where it shows a net price, they were presumably bought from some of the large stockholders of the American Can Company direct.

Q. What is the relationship between the purchase of rights during the offering period and stabilization efforts?

A. Under the Rules of the S.E.C. the purchase of rights in the open market during a subscription period is not deemed to be a stabilizing transaction. The manager may, if he sees fit, under the Articles of Agreement, also enter on the stock exchange a stabilizing bid for stock.

Q. But the entry of a stabilizing bid is considered to be a stabilizing operation?

A. Yes, sir, if you have transactions at that bid.

Q. If you have transactions. But the simple entry of a bid need not be reported, is that correct?

A. The rules in that respect have been changed recently. At the time this issue was offered, the entering of a stabilizing bid was not a stabilization unless a transaction took place at that bid.

I am not too sure about the effect of the more recent rule.

[fol. 297] Q. At least at the time of this issue, it was not deemed to be a stabilizing effort?

A. The entering of a bid was not stabilization, but if you made purchases on that bid, it was.

Q. Do you have a recollection——

A. No bid was entered in this case.

Q. No bid was entered.

And where, on this document—on Page 2, it says "Stabilization transactions, none,"—would that entry be in that form, even if, as you say, no bid was ever entered? I mean as far as Morgan Stanley is concerned.

A. Two lines below there, it indicates that no bid was entered.

Q. Do you have a recollection with respect to the relative success of this offering, Mr. Emerson?

A. Well, this happened seven years ago, but to the best of my knowledge it was considered successful.

Q. What is there in the four corners of this document that aids recollection with respect to the matter of success or lack of success?

A. Well, the subscription price was 26¼; lay offs took place at 28½, 28¾, 28⅞, and 29, which would indicate that the market was rising slightly during the period of the subscription, at least during the period of the lay offs.

Q. Can we make a generalization with respect to interpreting these documents and comparing the subscription price offering and the price of the lay-offs, for purposes of determining success of an offering?

A. Well, there you get into a question of the definition of success again.

Q. That is one of the things I would like to clear up with you this morning, if we may. Yesterday I think there was perhaps some confusion as to "Success to whom" and to what extent, so perhaps this would be a convenient time, [fol. 298] Mr. Emerson, if we would have you undertake to describe for us in connection with the issue of securities, what makes it a success or what it—if not a failure, something short of a success; and in that connection, I ask you to discriminate——

A. To what?

Q. (Continuing)—to discriminate between "Success to the underwriters," and "Success to the issuer," and "Success" in terms of the consequent price of the stock on the market.

Am I correct to say that as far as the underwriter is concerned, the issue is a success in terms of that issue, and solely in terms of that issue, if there is a profit on his transactions?

A. Not necessarily.

Q. (Continuing)—in purchasing the securities and reselling them at a profit?

A. Not necessarily. If the underwriting group, to make it simple—take a bond issue—if they purchase a bond issue at 99 and offer it to the public at par, and they sell only part of the issue at par, the group is terminated, the un-

old bonds are divided among the underwriters, they sell hem at the then market, which is less than par; they may nd up with a black figure on their books, but not what hey started out to get, and I would not call that a successul offering.

Q. So that if the profit anticipated isn't realized in ctual operation, the underwriter doesn't feel that it is a uccess?

A. That is correct.

Q. Although it may be profitable?

A. That is correct. Usually in the case of a bond issue hen the group is terminated, if the bonds sell on the open narket at below the public offering price, we would not onsider it a success, whether or not we had achieved our ull profit.

fol. 299] Q. Now, in connection with the issue of equity ecurities does the market during the offering period have ny effect upon the success of the offering from the standoint of the underwriter?

A. Yes, sir.

Q. So that is it accurate to say that if the market price alls below the offering price, that generally it indicates he prospects are toward an unsuccessful offering?

A. If the market price at the end of the subscription eriod is below the subscription price, obviously very few tockholders are going to subscribe. If they can get the ame security at a lower price in the open market, the nderwriters have to take it up at the subscription price, nd if the market is below that, it is not a success.

Q. So that when you make the statement that an offerng is a success from the standpoint of the underwriter, it ecessarily implies, does it not, a certain statement with espect to what the market action was in respect to the ssue of those securities?

A. Well, certainly if the market goes below the subcription price, and stays below the subscription price durng the subscription period, it is not a success by any definion.

Q. So that if you say, as you said yesterday, with espect to a number of documents that were introduced in vidence, that the offering was a success—and I think on

cross examination you indicated that you were talking about success from the standpoint of the underwriter——

A. I was talking about success from the standpoint or point of view of the document that I had in my hand. I could not remember the market action.

Q. Well, if the market action had been adverse, so that the market had gone below the offering price, you would have recollected, would you not, that that would not make [fol. 300] the offering a success in the terms of the underwriter's interests?

A. That is correct.

Q. Now, in entering into such an underwriting agreement as the document you have before you, and the documents which were exhibited to you yesterday, you mentioned, I believe, that prior to the entry into such agreements you had consultations with the issuer with respect to the form of financing that would be employed by the issue?

A. In many cases.

Q. But not necessarily in all?

A. Not necessarily in all.

Q. And it is a part of the function of investment bankers, is it not, to give issuers the benefit of their expert judgment as to the best or most appropriate means of financing in terms of the financial condition of that company, and in terms of the cost of obtaining the financing in the light of the market conditions at the time?

A. Yes, sir.

Q. When you enter into such underwriting commitments it entails an element of risk on the part of the underwriters, does it not?

A. Yes.

Q. And the terms of the underwriting agreement in respect to the matter of what is known as spread is a reflection of the degree of risk as appraised by the underwriters, is it not?

A. In general; not necessarily in every case.

Q. Could you qualify your answer, Mr. Emerson, to tell us what additional components enter into the spread?

A. Yes. An issuer knows what spread has been given to underwriters on similar issues which, to some degree, [fol. 301] establishes, shall we say, a going rate for that

type of financing in that market; the issuer does not want to pay a spread that is larger than the going rate for that particular type of an issue.

Q. And when an underwriter enters into an underwriting agreement with an issuer, the spread represents the difference between what the public offering price is going to be, and what he is going to pay the issuer for the securities, is that correct?

A. That is correct. That is the gross profit of the underwriting group, assuming a sale at the public offering price. You are talking now about the purchase and resale of securities, rather than an underwriting of an offering under rights?

Q. That is corect. So is it accurate to state that the entry by underwriters into an underwriting agreement with an issuer on certain terms, which among others is the spread, reflects the judgment of the underwriters with respect to whether or not they can successfully market the securities or resell those securities at a profit on the basis of the spread agreed upon?

A. They hope to sell them at a profit.

Q. That is their judgment in entering into the transaction, is it not?

A. There are some exceptions to that. There are times when in your preliminary discussions with an issuer, you agree as to what the spread will be much earlier than the time you sign your underwriting agreements. Then when it comes time to sign the underwriting agreements, market conditions may have changed, but the spread has already been agreed upon.

Q. So that some time after you undertake a commitment, and between the time you actually sign the document incorporating the commitment, there may be a change in cir-
[fol. 302] cumstances where you might regret that the spread is as small as it is? Is that the substance of what you say?

A. Yes, sir. The spread might have been agreed on long before you enter into the agreements. You agree on a spread—oh, well before you sign your underwriting commitment, in most cases.

Q. But I take it that your having agreed to the spread binds you, and you execute the document incorporating your

obligation in accordance with your previous oral agreement?

A. That is correct.

Q. So that that determination of spread and the fact of your willingness to enter into it, as of the time that you enter into it, indicates the judgment of the underwriters that they can successfully market the issue at a profit?

A. Well, there have been times when the underwriters have signed underwriting agreements in full knowledge that they probably were not going to have a successful offering.

Q. Is that very rare?

A. It is comparatively rare.

Q. What would be the circumstances that would give rise to such an occasion?

A. You have in a sense a moral obligation to go ahead on terms that have been discussed previously, and you don't want to back out of that obligation.

Mr. Owens: I move that Government's Exhibit 57 be admitted into evidence.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit 57.)

Mr. Cowen: Before we start on the next one, I would [fol. 303] like to clear up a couple of points that I think we may be more confused on today than we were yesterday.

Mr. Emerson, do the records that you now have in court indicate whether the market went up or down either before, at the time of, or shortly after the sale of the stocks on the matters that you testified to?

The Witness: You are speaking of the American Can issue?

Mr. Cowen: I am speaking of all the matters that you have testified to in court. Do these records show whether a stock went up or down at the time of the issue?

The Witness: In some cases, Mr. Cowen, they show that layoffs—they show layoff prices. Now to the extent that layoff prices were on an ascending scale, as they were in the American Can issue, it would indicate that on those particular days the market was better.

It would not necessarily mean throughout the period that the market was better, or it might have gone down after the layoffs took place.

Mr. Cowen: So that the records that you have before you do not definitely state, concerning all the issues you have testified to, the actual effect on the market in every instance, do they? I mean, they aren't clear. They may take a period of only one or two days, isn't that what you are talking about, usually?

The Witness: Probably more than one or two days, but they show isolated days, I think, generally 3 to 5 during the subscription period. They also show the prices, I think, in most cases at which the unsubscribed stock was sold, which would be after the termination of the commitment. [fol. 304] Mr. Cowen: How soon after?

The Witness: A day or two.

Mr. Cowen: Just a day or two. Nothing is shown of anything after that, a week or two after, as to what happened to the stock?

The Witness: No, sir.

Mr. Cowen: So that actually, in order to determine whether it is a success from the standpoint of a stockholder, you would have to take a greater period than one or two days, would you not, to see how the stock acted a few days or a week or two after?

The Witness: Probably longer than that.

Mr. Cowen: Probably longer than that. Now, if your records that you have in court do not show these periods, you are only testifying from your own recollection?

The Witness: That is correct.

Mr. Cowen: You now state, do you not, that you don't have an actual recollection in most of these instances of the actual market prices without consulting other records, isn't that true? There is nothing in court to indicate what happened to the stock after a few days unless you remember it yourself?

The Witness: There was a tabulation given me yesterday, of the prices of the Socony-Vacuum stock, and I don't remember now whether that went beyond the expiration of the rights or not.

Mr. Cowen: Usually the records that you have here in court are only for just a few days after the issuance?

The Witness: That is correct. That was the only one that [fol. 305] I remember, at least, where there was a tabulation of prices over a considerable period.

Mr. Cowen: So that what the underwriter might consider a success by way of lay-offs or otherwise for a day or two after issue, might not be actually so if you take up the issue a week or two later, isn't that correct. In other words, the market might make a down trend within a week or two weeks, and these stocks may go down considerably?

The Witness: That is correct.

Mr. Cowen: And nothing you have testified here indicates the price of the stock after the period except as shown in these records, which generally is just a day or two?

The Witness: The final price shown on these records would be the price of the sale of the unsubscribed stock which would be generally about two days after the expiration of the rights.

Mr. Cowen: And there is nothing in your records to indicate what happened after that period, is there?

The Witness: That is correct, with the possible exception of the Socony Vacuum.

Mr. Cowen: That one issue.

The Witness: And I don't remember how far that went.

Mr. Cowen: So that when the Government continually asked you whether a sale is a success, isn't it true that you have to give it only from the underwriters' standpoint; that is, from the day or two after the issuance, and that is about all you can do from your records as you have them here?

[fol. 306] The Witness: From these records, the only basis I would have for discussing success, would be from the underwriters' point of view.

Mr. Cowen: I thought we had that clear yesterday, but apparently it wasn't. Thank you, Mr. Emerson.

By Mr. Owens:

Q. Yesterday, Mr. Emerson, you spoke of success, and used the expression that it is not a success if it leaves, what you characterized, as a bad taste in the mouths of certain people that are concerned or affected.

Who are the people that you were speaking of in that connection?

A. Well, in that particular case, I was thinking of the company stockholders.

Q. The stockholders of the company?

A. Yes, sir. You can have success from a half a dozen different points of view.

You could say the issue was successful from the issuers' point of view, if they got their money on the line as the contract provided for. Of course, the underwriters in that case might be badly stuck, but purely from the selfish point of view of the issuer, it was a success; he got his money.

You can look at it from the point of view of the underwriters, whether they achieved a profit at all, or whether they achieved the profit they expected to.

You can look at it from the point of view of stockholders of the company, as to the impact of that offering on the market price.

Q. Isn't it a fact that a large measure of an underwriter's success depends upon the confidence that he builds up with the members of the syndicates that he forms with respect to the market action of stock in relation to the public offering price?

A. May I hear that question, please?

[fol. 307] Mr. Owens: Read the question, please.

(Question read)

By the Witness:

A. No, sir.

By Mr. Owens:

Q. Let me approach it this way. In the event that a stock is offered to the public at a certain price——

A. Are you speaking now of a rights offering?

Q. No, I am speaking of an equity offering, either original issue or secondary issue.

Mr. Bushby: I object to joining those two together. They are entirely different.

The Court: Sustained.

By Mr. Owens:

Q. With respect to original issue of an equity offering.

A. Original issue by rights?

Q. No, without rights.

A. A sale by an issuer to the public or cash price?

Q. Yes. If there is a substantial drop in the market after the termination of the agreement among the underwriters——

Mr. Bushby: I must object to that. There has been no example given here. There has been no testimony that there has been any offering by an issuer to the public of an equity security not to the stockholders, I believe.

Mr. Owens: What we are trying to elucidate here is what makes a success in terms of underwriters financing equity.

[fol. 308] Mr. Bushby: But there is no example given here of an issuer selling securities, equity securities to the public without a rights offering to its stockholders. You are asking him about something that there has been no example of here.

Mr. Owens: I believe that certain of the exhibits yesterday related to equity offerings without rights.

Mr. Bushby: Will you find one and bring it? I say there isn't any such thing.

Mr. Owens: I will check, if your Honor thinks it is necessary at this point.

The Court: I think you should.

Mr. Bushby: There isn't any such thing.

By Mr. Owens:

Q. Mr. Emerson, we will defer the questions with reference to that until we have introduced in evidence equity offerings where no rights are involved.

I will ask the reporter to mark the following document as Government exhibit for identification 58. It is headed, "Not

Underwritten Subscription Offer 906,917 shares Philadelphia Electric Company."

It further can be identified as document number 765 and 766, so identified in connection with the deposition of Mr. Emerson.

(Thereupon said document was marked Government Exhibit 58 for identification.)

By Mr. Owens:

Q. You have this document before you, Mr. Emerson.

A. Yes, sir.

Q. At the top of that document, the first heading is "Not underwritten," and I note that the first paragraph relates [fol. 309] to an agreement of June 4, 1954, an agreement between Drexel & Company and Morgan Stanley & Company, entering into an agreement with the Philadelphia Electric Company, in which "We agree to use our best efforts to form and manage a group of security dealers, which includes the dealer-managers, to solicit subscriptions."

I take it that the shares of common stock that are referred to in the caption "Common Stock," are of the Philadelphia Electric Company.

Would you distinguish for us the differences between such an agreement, "best efforts agreement," and the normal underwriting, in terms of the risk to the underwriter?

A. In a normal underwriting agreement, underwriters are obligated to take up at the end of the subscription period whatever securities are not taken up by stockholders. They have a firm commitment to take it up, subject only to an effective registration statement and approving legal opinions by counsel.

In the case of a dealer-manager solicitation, such as this Philadelphia Electric offering was, there is no commitment by the underwriters to take up the stock at the end of the subscription period; the company itself carries that risk.

Q. So that in a firm commitment, the company knows the proceeds of the issue?

A. Yes, sir.

Q. At the time they sign the underwriting agreement with the manager of the syndicate?

A. That is correct.

May I modify that slightly?

In many commitments, many offerings of stock to stockholders, there is what we call a split fee. The underwriters receive a fee for their commitment. They also, in connection with their activities in laying off stock, receive an additional fee for whatever stock they lay off.

[fol. 310] Therefore, if you are using this so-called "split fee" type of underwriting commitment, the company cannot exactly compute at the beginning of the period how much money it will receive at the end, because it does not know how much stock will be laid off by the underwriters and what the company's payment to the underwriters will have to be.

Q. In those cases that you refer to as "split fee arrangements," the issuer is participating with the underwriter in the risk, as to what the market will do during the offering period, is that correct?

A. Only to a very minor degree. The company knows that if the underwriters were to lay off every share of stock, which would be, from a practical point of view, impossible, how much it would have to pay off so it can compute the minimum it would receive. Now, actually, it is going to receive substantially more than that.

Q. Well, even in the split-fee cases, the issuer knows that he is going to receive a definite amount of proceeds, depending upon the purchase price that is paid to it by the underwriting group. That, however, is subject to being diminished or increased by profits or losses that are occasioned during the offering period by the underwriters' action in connection with laying off rights or stabilizing efforts inequity, without rights, financing. Is that accurate?

A. I am not quite sure.

If I could state it in my own words—what I think you mean—the underwriting group knows that they are going to receive, in cases where there is a split fee, the stand-by fee for every share of stock they underwrite. They also know

that if they lay off stock during the subscription period, and [fol. 311] also whatever stock they take up at the end, unsubscribed stock, they will receive an additional fee from the issuer for their sales efforts in placing that stock.

Q. Do you recollect, Mr. Emerson, the circumstances of this "best efforts agreement" in connection with the sale of the common stock of the Philadelphia Electric Company?

A. Do I recollect what?

Q. The circumstances in connection with the entering into this agreement.

A. I don't know what you mean by "circumstances."

Q. Well, the factors that caused this to be a "best efforts agreement," as distinguished from a firm commitment agreement.

A. It know it was determined by the company.

Q. Pardon?

A. It was determined by the company. The Company wished to do it that way.

Q. That was the company's preference?

A. Yes, sir.

Q. When the company determines that it wants to use a best efforts form of agreement with underwriters, what does that generally reflect with respect to the marketability of the securities?

Mr. Cox: I object, your Honor. I think that is really taking the witness too far into the realm of speculation.

The Court: Sustained.

By Mr. Owens:

Q. Well, the agreement of a best efforts character does not reflect, necessarily, a higher risk, Mr. Emerson?

A. No.

Q. And where an issue——

A. There is no risk from the point of view——

Q. Of the underwriters?

A. Underwriters.

[fol. 312] Q. But I mean from the standpoint of the marketability of the issue, is there a necessary connection be-

tween such an agreement and the estimate of the parties as to the marketability of the issue?

A. Would you state that again, please?

Q. As I understand it, there are two types of agreements, in general that underwriters make with issuers: One is a firm commitment; another is this best efforts.

A. Yes, sir.

Q. In the best efforts agreement, there is a relatively small or no risk to the underwriter in connection with the market action of the stock being marketed?

A. That is correct.

Mr. Cox: May I have that question and answer read, please?

(Record read.)

By Mr. Owens:

Q. Where a best efforts agreement is formed, can you infer from that anything with respect to the underwriters' estimate of the marketability of the securities?

A. No.

Q. Sometimes then, I take it, the issuer, rather than pay the underwriters for assuming the risk, is willing to assume the risk himself and have the securities marketed on that arrangement, is that correct?

A. Yes.

Q. So is it fair to state then where best efforts underwriting, or rather best efforts agreements are reached between underwriters and an issuer, that sometimes it reflects the issuer's desire to assume the risk of market declines during the offering period, rather than paying the underwriter a spread for assuming that risk?

A. Yes, but they also have other reasons.

[fol. 313] Q. What are representative other reasons, Mr. Emerson?

A. When a company has a great many stockholders, and it offers rights to those stockholders, the stockholders go into the offices of their brokers to get advice to handle the

filling out of the subscription form, and so forth. If those brokers are not members of the underwriting group, they get no compensation for the work they do for their clients. There are some firms that have advocated the dealer-manager form, simply because in those cases the broker would receive some compensation for the work he did in helping the company's stockholders.

In other words, there is a fee paid for obtaining subscriptions.

Mr. Tierney: If the Court please, I am sure your Honor is impressed with this witness, as I have been impressed, and I hesitate to make this objection because I know he couldn't help but be making a good impression. But I can't see where this line of inquiry that counsel has been indulging in this morning has any relation to what is before this Court, and I object to it going on any further.

The Court: I think it has been sufficiently covered now, counsel.

Mr. Owens: I ask that Government's Exhibit 58 be admitted in evidence.

The Court: It is admitted.

(Said exhibit, so offered and received in evidence was marked Government's Exhibit No. 58.)

The Court: The Court stands recessed for ten minutes.

(A short recess was taken.)

[fol. 314] The Court: Proceed, please.

Mr. Owens: I ask the Reporter to mark this document, headed, "906,917 shares Philadelphia Electric Company Common Stock," dated July 7, 1954, as Government Exhibit No. 59.

(Thereupon said document was marked Government's Exhibit 59, for identification.)

By Mr. Owens:

Q. Would you state what that Exhibit No. 59 is, Mr. Emerson?

A. Yes, sir.

Q. Would you state what it discloses?

A. It is a daily record of the subscriptions, both in New York and in Philadelphia, for the offering of 906,917 shares of Philadelphia Electric common stock.

It also shows the price range of the rights and of the stock during the period from June 14 to June 28, 1954.

Q. From your examination of that document, can you indicate what the relative degree of success of that offering was?

A. The stockholders did not take up all the stock. They took up 96.9 per cent of the stock.

Q. What does it disclose with respect to the market price of the security during the offering period?

A. That at the beginning of the offering period—I think it is the beginning—at least on June 14th the price of the common stock was 35⅞ high. 35½ low. At the end of the subscription period, it is 36⅞ high, 36½ low.

Mr. Owens: I offer Government's Exhibit No. 59 into evidence, your Honor.

The Court: It is admitted.

[fol. 315] (Said document, so offered and received in evidence, was marked Government's Exhibit 59.)

Mr. Owens: Mr. Cox has some questions with respect to Government's Exhibits 58 and 59.

Mr. Cox: Mr. Emerson, in what business is the Philadelphia Electric Company engaged?

The Witness: It is a large public utility selling electricity in the Philadelphia and surrounding area. I think in certain places it also sells gas.

Mr. Cox: Is there any difference in the marketability between the common stock of public utility companies and the common stock of ordinary business corporations, manufacturing companies?

The Witness: Well, the earnings of utility companies vary much less than do those of most industrial companies, therefore, their stock prices vary much less. They are much more stable, in other words.

Have I answered your question?

Mr. Cox: Let me ask you this further question: In what way, if any, does that affect the marketability of the common stock of public utility companies?

The Witness: Well, it is fair to presume that during the subscription period the price of a utility stock would be much less volatile than that of an industrial company.

Mr. Cox: Let me direct your attention to the price entries as shown on Government's Exhibit 59. They start on Monday, June 14. This agreement between the two investment banking firms and the Philadelphia Electric Company, [fol. 316] the Government Exhibit for identification 58 shows, was signed on June 4th.

Do you see that?

The Witness: Yes, sir.

Mr. Cox: Do you recall whether the fact that there was to be this offering was known in the market prior to Monday, June 14th?

The Witness: Oh, yes. The agreement with soliciting dealers was signed June 9th. Before the offering started there would have to be an effective registration statement which means that it would have to have been in registration for a period of three weeks roughly.

I presume that, although this document does not so indicate, the Philadelphia Electric Company sent a notice to their stockholders even earlier that this offering would take place.

Mr. Cox: Is there anything in these documents that would disclose to you what movement took place in the price of the common stock of Philadelphia Electric Company between the date when the fact of this offering became known in the market and Monday, June 14th?

The Witness: There is nothing whatever, nor is there anything to indicate what the general market was doing.

Mr. Cox: That is all.

Mr. Owens: I ask that the reporter mark for identication the document identified as "Numbers 72, 73, 74, 75 and 76" of the documents subpoenaed in conection with the deposition of Mr. Emerson.

[fol. 317] (Thereupon said document was marked Government's Exhibit 60 for identification.)

Mr. Owens: Did your company participate in this underwriting?

The Witness: Yes, sir.

Mr. Owens: The facts concerning which are entered on this exhibit?

The Witness: Yes, sir.

Mr. Owens: In what capacity?

The Witness: We managed the underwriting group.

Q. Do you know the total dollar amount of the underwriting?

Mr. Cox: I think it is 199,279,000.

The Witness: That is correct.

By Mr. Owens:

Q. Did you participate personally in this underwriting arrangement, Mr. Emerson?

A. I did not negotiate the terms. I sat in on all the discussions in our office that took place.

Q. Can you tell us what the relative success of this underwriting was? If you would, Mr. Emerson, to the extent that it can be inferred from this document itself, I would appreciate it if you would indicate the basis in this document for your conclusion with respect to its success or lack of success?

A. Well, the subscription price was 45½. We had 7 layoffs. The first was at a price of 50½. The stock weakened steadily. The last was at 47½ or two points above the subscription price.

[fol. 318] We laid off 1,671,224 shares out of the total offering of 4,379,000 odd, which is a heavy layoff, and there were——

Q. Well, what significance does the price of the layoff have, Mr. Emerson?

A. The prices were at a descending scale. The market was weakening during the subscription period. The impact of the offering was quite noticeable in the steadily lower prices at which the stock was laid off.

Q. But the last layoff of 2/14 that would be, I guess, Valentine's Day of 1957, was still two points above the subscription price, was it not?

A. Yes, sir.

Q. What conclusion do you draw from that with respect to the success of the offering?

A. From whose point of view?

Q. Well, let's take it from the point of view of the underwriters.

A. Well, the underwriters, from a purely selfish point of view, would have found this a very successful issue because it was necessary to lay off so much stock, and they get an extra fee for laying it off. That is a selfish point of view, but it answers your question.

Q. How was it with respect to the apparent reaction of the market to the offering of the securities?

A. Well, the market fell three points during the subscription period. The first layoff was January 31st at 50½, and the last one on February 14 was at 47½, a decline of three points.

Q. How do you characterize the success of the issue from the standpoint of the issuer?

A. The issuer got the full amount that they had expected to receive, but it cost them a substantial amount to lay off over 1,600,000 shares.

[fol. 319] Q. Did they participate in the gain or loss resulting from that layoff?

A. No, sir. If the underwriters buy rights and exercise those rights and sell the stock, and there is a time lag there, and the underwriters are unable to sell the stock at the equivalent price of the rights, that is a loss to the underwriting group. The issuer does not participate in that in any way.

Q. How were the rights acquired by the underwriters?

A. I assume mostly on the New York Stock Exchange—it would be necessary to compute this out. Let's see, we bought 16,172,250 rights. Of those, 7,602,000 were purchased on the New York Stock Exchange. 81,100 on the Pacific Coast Exchange. 8,489,150 over the counter.

Q. Were those rights exercised by the underwriters?

A. Yes, sir.

Q. Were they exercised at a profit, Mr. Emerson?

A. I don't know.

Q. From Page 5 of that exhibit, can you determine that?

A. Well, the final item is net profit transferred to underwriters, so I assume we had a profit.

Q. You don't have to assume, do you, Mr. Emerson? Isn't it a fact that was substantial profit?

A. A good part of that—there was a profit, yes. A good part of that profit item accrued from the fact that we received, the underwriting group received a dollar a share for all of the stock laid off, and in laying it off, 90 cents was paid to those who sold, so that the underwriting group as such received a profit of ten cents a share, which would have been, roughly, about 150,000 out of the 375,000 profit.

Mr. Owens: I offer Government Exhibit No. 60 into evidence.

[fol. 320] The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 60.)

Mr. Owens: I will ask the reporter to mark for identification, a document identified with the numbers 412, 413, 414, 415 and 416, document subpoenaed in connection with the deposition of Mr. Emerson.

(Whereupon, said document was marked Government Exhibit No. 61 for identification.)

By Mr. Owens:

Q. Did your company participate in that underwriting, Mr. Emerson?

A. We did.

Q. In what capacity?

A. We managed the underwriting group.

By Mr. Owens:

Q. That is an issue of Consumers Power Company, 4⅝ per cent convertible debentures due in 1972. Do you have information with respect to the success of that offering, Mr. Emerson?

Mr. Tierney: If the Court please, I suggest that inasmuch as this word "success" has had so many different meanings, that the witness be interrogated directly as to what success he is talking about.

The Court: What type of success are you referring to, counsel?

By Mr. Owens:

Q. First we will take success in market reaction to the offering, Mr. Emerson, if you have that information?

[fol. 321] A. Market reaction of what, the common stock of the Consumers?

Q. Yes.

A. There is nothing here that indicates it, that I see.

Q. Now market reaction with respect to the debentures of this offering?

A. We laid off during the subscription period, 3,154,200 debentures. The first layoff was at 103⅛; the next at 102⅛; the next at 101½; the last at 102¾.

Mr. Owens: I offer Government's Exhibit No. 61.

Mr. Burnham: Your Honor, may our standing objection apply also to these debenture issues, that we are now getting into, both the testimony and the documents?

The Court: You have a standing objection.

(Whereupon said document, so offered and received in evidence, was marked Government's Exhibit No. 61.)

Mr. Owens: I ask the reporter to mark for identification Government's Exhibit 62, which is a price record of the Consumer Power Company debentures, referred to in Government's Exhibit No. 61.

(Whereupon said document was marked Government Exhibit No. 62 for identification.)

Mr. Owens: There may also be identified as Nos. 381 through 384 documents in connection with the deposition of Mr. Emerson.

I offer Government's Exhibit No. 62, your Honor.

The Court: It is admitted.

(Whereupon said document, so offered and deceived in evidence, was marked Government's Exhibit No. 62.)

[fol. 322] Mr. Bushby: Are you leaving Consumers Power?

Mr. Owens: No, I have one other document here.

I ask the reporter to mark for identification, Government's Exhibit No. 63, which is headed "Final Report," and also relates to the issue of convertible debentures by

the Consumers Power Company. It is dated November 7, 1957.

(Whereupon said document was marked Government's Exhibit No. 63, for identification.)

Mr. Owens: I offer that document, your Honor.

The Court: It is admitted.

(Whereupon said document, so offered and received in evidence, was marked Government's Exhibit No. 63.)

Mr. Bushby: I would like to ask a question on this issue, if you are moving on.

The Court: You may.

Mr. Bushby: Mr. Emerson, this was a convertible issue, convertible to common stock of the company.

The Witness: Yes, sir.

Mr. Bushby: $47 a share, is that correct?

The Witness: I haven't seen that figure in this document, but that is as I remember it.

Mr. Bushby: Do you know what relation $47 a share, that conversion price, had to the market value of outstanding common stock at the time?

The Witness: It was slightly above the then value of the common stock.

Mr. Cox: But very close to it.

The Witness: It was just a few points away from it. [fol. 323] I don't remember how many.

Mr. Bushby: And this was an offering to stockholders?

The Witness: Yes, sir.

Mr. Bushby: And therefore quite different from a secondary offering?

The Witness: Quite different.

Mr. Cox: Mr. Emerson, is Consumers Power Company a public utility?

The Witness: Yes, sir.

Mr. Owens: I ask the Reporter to mark for identification Government's Exhibit No. 64.

It is a document dated February 8, 1955; and may also be identified among the documents submitted in connection with the Deposition of Mr. Emerson Nos. 925 through 934.

(Thereupon said document was marked Government's Exhibit 64, for identification.)

By Mr. Owens:

Q. This document, consisting of some several pages, relates to an offering of General Motors Corporation common stock, $5.00 par value. It is a rights offering.

Did your company, Mr. Emerson, participate in that offering?

A. Yes, sir.

Q. In what capacity?

A. We managed it.

Mr. Owens: I offer Government's Exhibit No. 64.

The Court: It is admitted.

[fol. 324] (Said document, so offered and received in evidence, was marked Government's Exhibit 64.)

Mr. Owens: I ask the Reporter to mark for identification Government's Exhibit No. 65.

(Thereupon said document was marked Government's Exhibit 65, for identification.)

Mr. Cox: This is entitled, "General Motors Common Stock," and Mr. Emerson, I believe, can identify that for us.

Mr. Cox: The numbers?

Mr. Owens: Excuse me. It is Nos. 960 through 966 of the documents subpoenaed in connection with the deposition of Mr. Emerson.

By Mr. Owens:

Q. Would you tell us what that document is, Mr. Emerson?

Mr. Burnham: Have you another copy of that, Mr. Owens? We never did receive a copy of this document, even at the time of the Emerson deposition.

(Document handed to Counsel.)

By Mr. Owens:

Q. What is that document, Mr. Emerson?

A. This is a list of the underwriters of the General Motors Corporation common stock offering, showing their percentage commitment, what that would have been trans-

lated into shares, and how many shares, if any, each underwriter purchased as a dealer. That is in connection with layoffs and sale of unsubscribed stock.

[fol. 325] Q. Did you participate personally in connection with the marketing of this issue?

A. Yes, sir.

Q. Did you participate in the selection of the underwriters that were to be invited to join the Syndicate?

A. I had a voice in it. There were a half dozen of us that worked on it.

Q. And do you have a recollection as to the response to the invitations to the underwriters to participate in this Syndicate?

A. You mean how many firms to whom we offered an underwriting position declined it?

Q. That is correct.

A. I have no recollection.

Q. You don't have any recollection, either way, as to whether anybody did or did not decline; or you have no recollection of anybody declining?

A. I think there were one or two declinations, but I am not certain.

Q. Could you tell us what the action of underwriters in accepting or declining an underwriting participation reflects in terms of their estimate of the marketability of the stock to be offered?

Mr. Cox: I object, may it please the Court. I think he is now asking Mr. Emerson to speculate about the state of mind of other people.

The Court: Sustained.

By Mr. Owens:

Q. Do you recollect what the total amount of dollar volume involved in this offering was, Mr. Emerson?

A. $328,551,000.

[fol. 326] Q. How does that dollar volume compare with most security issues, sir?

A. It is unusually large.

Q. Unusually large?

A. Yes.

Q. How unusually large?

A. I don't know what you are comparing it with.

Q. Well, in terms of frequency of offerings of that magnitude, Mr. Emerson?

A. So far as I know, in dollars, it is the largest industrial offering under rights that has been made.

Q. Can you tell us what the success of the underwriting was from the four corners of this document from the standpoint of the market reaction?

That is Government's Exhibit No. 64.

A. Market reaction?

Q. Yes, sir.

A. During the subscription period the stock declined in price. First, the initial layoff was—this is hard to read—I think it is 97¾; the second one at 99; and back to 97½; and the lowest price of the layoff was 93⅛; and the final at 94½.

Q. How does that compare with the reaction of the market to subscription rights offerings of common stock generally?

A. It almost always declines.

Q. It almost always declines, does it not?

A. Yes, sir.

Q. Now this is an offering of common stock, and I understand that is an offering to raise new equity capital, is that correct?

A. That is correct

Q. In connection with this offering, a prospectus is normally issued, is it not?

A. Necessarily issued.

Q. Necessarily issued. And in that prospectus, do they describe the use to which the proceeds of the offering are to be devoted?

A. Yes, sir.

[fol. 327] Q. Do you recall, in general terms, the purposes to which the proceeds of this offering were to be devoted?

A. I remember that the company had a very material expansion. It invested a number of hundreds of millions of dollars in additional plant, and the purpose of this offering was to recoup for the treasury some of those expenditures, and to provide for further expenditures. I do not remember the figures.

Q. Well, in distinguishing between a new issue such as this, of common stock, and the marketing of a secondary issue, is it accurate to say in one case that—that is, in the secondary offering, the capital is already invested in a business and there is an experience factor with respect to its earning capacity, as distinguished from in the case of a new issue that the capital is to be put to some use in the future and its earning capacity is open to estimates as to how successfully it will be employed?

A. Yes, except that I think you have a pretty good expectation based on the company's experience, in the case of a rights offering.

Q. You have a basis for arriving at an informed judgment as to how successfully the capital will be employed?

A. That is correct.

Q. But in the case of a secondary offering, you have actual experience as to how the capital is being employed, do you not?

A. Has been employed.

Q. Has been employed, is that correct?

A. Yes, sir.

Q. With respect to the decline in the figures at which the rights were laid off, by examining that record of the decline in terms of impact on the market, apart from the fact [fol. 328] that it declined, is that a decline that was unusual so as to indicate an adverse impact on the market?

Mr. Cox: I object to the question unless the comparison is stated in relation to something. Unusual compared to what?

Other rights offered of the same size, smaller size?

The Court: I think the question should be more specific.

By Mr. Owens:

Q. Is it in relation to the decline of rights offerings of large industrial corporations?

A. Yes? I don't know what your question is.

Q. Is that decline unusually large or significant from the standpoint of the amount of the decline?

A. I have never seen figures on the average, and I would not know how to answer your question.

Q. You are unable to state from examining the extent

of that decline the relative market impact of the offering of these securities?

A. Well, there is usually a decline. Now what per cent it is of the market, I just don't know. It varies so.

Mr. Owens: I offer Government's Exhibit No. 65, which is the list of the participating underwriters in the General Motors subscription rights offer.

The Court: It is admitted.

(Said exhibit, so offered and received in evidence was marked Government's Exhibit 65.)

By Mr. Owens:

Q. Could you tell us what the underwriting spread was on that rights offering, Mr. Emerson?

[fol. 329] If you will turn to Page 2, Mr. Emerson, it may be helpful.

A. I don't see it there. I don't find it in this document. I am surprised that it is not here.

Mr. Owens: I will ask the reporter to mark for identification Government Exhibit No. 66, the document dated October 1, 1957, which can also be identified as documents 511 through 514 of the documents furnished in connection with the deposition of Mr. Emerson. This is underwriting spread on certain large common stock offerings.

Mr. Burnham: Mr. Owens, this is another of the documents that we did not receive at the time of the deposition. May I have a copy of it, please?

Mr. Owens: It is my understanding that there were ample numbers of photostats made for everybody. Now if there is some error, I don't understand it, but I am sure I can arrange to supply it.

Mr. Cox: I think the error may have been made by the photostater.

Mr. Burnham: We first received your list yesterday and checked it last night, and I advised Mr. Ludlow this morning that we did not have this document, a previous one, and several others.

Mr. Owens: I can't make the photostat now, but I will arrange to get it.

Mr. Tierney: Then I think you should defer talking about it until we have something to look at. I suggest that, your Honor. We don't have this exhibit, and it is apparently very important.

[fol. 330] Mr. Owens: I think perhaps that would be best.

The Court: The Court will recess now, and you see if you can't find some extra copies.

Mr. Owens: I apologize for the inconvenience, your Honor.

Mr. Reycraft: May I say a word, your Honor?

I believe counsel are agreed that we would like to observe the holiday Monday, if it is convenient to your Honor.

The Court: I anticipated your decision.

(Whereupon a recess was taken in the above-entitled cause until 2:00 o'clock p.m. of the same day.)

[fol. 331] Before Hon. Walter J. LaBuy, Thursday, February 19, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to recess.

Present: Same as before.

The Court: Proceed, please.

Mr. Reycraft: If your Honor please, we advised Counsel that we have two witnesses here who would like to leave today, and if there is no objection we would like to proceed with them out of turn, and call Mr. Emerson back perhaps late this afternoon or tomorrow morning.

The Court: The Court has no objection.

Mr. Reycraft: The Government will call Mr. Schroeder Boulton.

SCHROEDER BOULTON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Reycraft:

Q. Will you state your full name, please?

A. Schroeder Boulton.

Q. And what is your present business association, Mr. Boulton?

A. I am a partner in charge of research at Baker-Weeks & Company, members of the New York Stock Exchange.

Q. What type of research is that, Mr. Boulton?

A. This is financial research.

[fol. 332] Q. Do you contemplate making a change in your employment in the near future?

A. Beginning March 1st I will be a partner in charge of research at Goodbody & Company, also members of the New York Stock Exchange.

Q. And that is research relating to stock and securities?

A. It is.

Q. Mr. Boulton, sometime ago, did I have a discussion with you and ask you if you would be a voluntary witness for the Government in this proceeding?

A. You did, indeed.

Q. And what was your answer to me, sir?

A. My answer was that I couldn't possibly consider being a witness.

Q. And did I then advise you that we might call you to testify in response to a subpoena?

A. You did.

Q. And you are now here in response to a subpoena?

A. That is how I am here.

Q. Mr. Boulton, how long have you been with Baker-Weeks & Company?

A. Since December, 1931.

Q. And how long have you been chief of the research unit at Baker-Weeks?

A. Since 1938.

Q. And you have been a partner in charge of that division for how long?

A. Since the beginning of 1943.

Q. And have your activities in the firm been devoted exclusively to research?

A. I wouldn't say exclusively, but I have been in the Research Department from the very beginning. If I didn't learn something about the other aspects of the business, it would be a little bit unusual.

Q. You have been required, then, to become familiar with all the aspects of the securities field in order to give research advice, is that correct?

A. That is correct, although I am more familiar with [fol. 333] with research part of the business than any other part of it.

Q. What is the function of the Research Department at Baker-Weeks?

A. The function is the continuing study of the national economy, of financial trends and developments, broad trends, and trends as they bear on individual industries, and particular companies within these industries; the development of information about companies, a comparison of one company with another; and the development of opinions about the securities of these companies, all leading toward an attempt to give judgments, useful comparisons, involving selections among securities. It is a very complicated job. I don't think that summarized it very well.

Q. Do you make recommendations to investors relating to stocks?

A. We do.

Q. Do you publish a biweekly bulletin or any type of publication which contains advice to investors?

A. One of our publications is a biweekly bulletin that contains general comment on economic and financial trends. There is a section on attractive securities, and it has one or two other sections.

Q. Now are you responsible for the editing and the writing of a substantial part of that publication?

A. I am.

Q. How many persons work in the research department with you, Mr. Boulton?

A. We have ten senior analysts, some junior analysts, and associated staff people.

Q. Does your firm have offices elsewhere than New York?

A. Our offices are in Philadelphia, Toronto, Montreal, London, and Amsterdam, and we have representation in Geneva.

[fol. 334] Q. Does your firm engage in underwriting?

A. We do, but we do not lead underwriting syndicates. We engage in underwriting as participants. We also engage in private placements.

Q. Do the persons who are employed in your research department specialize with respect to the types of stocks which they follow?

A. They do.

Q. Are there persons who work under your supervision who follow the chemical industry?

A. There is one man under my supervision who follows the chemical industry and the pharmaceutical industry.

Q. Does he follow du Pont, in particular?

A. He does.

Q. And is there a man in your department who follows the automotive stocks?

A. There is. He follows the automotive and several other industries.

A. That would include General Motors, I presume?

A. It does include General Motors.

Q. Mr. Boulton, would you state in a general way the type of advice you give to investors on the long range prospects of the chemical industry and its securities?

Mr. Tierney: We object to that, your Honor; it is immaterial what type of advice he gives.

The Court: What is the materiality of that question, Mr. Reycraft?

Mr. Reycraft: We think it will establish, your Honor, as I get to the du Pont stock, to establish that it is generally considered a good investment and this firm recommends its purchase.

Mr. Cox: I will stipulate, if it please the Court, that the stock of the du Pont Company is a good investment.

[fol. 335] The Court: That is a different matter than the question you asked him.

Mr. Reycraft: All right.

By Mr. Reycraft:

Q. Mr. Boulton, has your firm recently made any recommendations with respect to the purchase of du Pont stock?

A. Yes, we have. We have been suggesting investment purchases of du Pont stock because of the company's resumption of a decided trend of growth and sales and operating profit margins and net earnings.

Q. Do you have any notes to which you can refer which permit you to state what your recommendation was in more detail?

A. In a biweekly review——

Mr. Tierney: If the Court please, do you offer this witness as an expert witness, or to prove that he has issued some bulletins?

Mr. Reycraft: I offer the witness as an expert on du Pont evaluation and the prospects of the market for du Pont and General Motors stock, and as a witness who can testify that a firm engaged in this business has advised its purchase.

Mr. Tierney: His recommendations are one thing, and what his opinion is is another thing.

Mr. Bushby: He hasn't qualified as an expert. He said he had a man under him who was an expert.

Mr. Reycraft: I will be glad to go over that.

By Mr. Reycraft:

Q. Mr. Boulton, does this man work under your advice and your supervision?

A. He does, but I don't have any intention of qualifying [fol. 336] myself as an expert. I am not here as a willing witness. I am here because I have to be here.

Mr. Bushby: Therefore you can only be asked to testify as to facts and not opinions, as I understand the law.

By Mr. Reycraft:

Q. Mr. Boulton, do you object to giving your opinion, if you have an opinion?

A. There is one thing that is unfortunate about the research end of the securities business. When the opinions

are given, they are often given in writing to several thousand people, so it is a little difficult to conceal them.

Q. Do you have any objection to stating what your opinion is and what opinion you have expressed by your department which works under your supervision?

Mr. Tierney: If the Court please, by his own admission he does not appear here as an expert, and therefore whether he is willing to express an incompetent opinion is immaterial.

The Court: It appears he is called as a fact witness, counsel.

Mr. Reycraft: Well, your Honor, if a witness is willing to express an opinion, may he be permitted to express it?

The Court: Yes, you may, if you are willing.

Mr. Bushby: I object if he is not qualified, and he says he is not qualified.

Mr. Reycraft: I didn't hear him say that. He said he was not appearing voluntarily.

Mr. Bushby: He said he was not holding himself out as an expert.

[fol. 337] By Mr. Reycraft:

Q. Are you willing to express an opinion at this time, Mr. Boulton, since you have appeared here and you are now under oath and you do have an obligation to tell the truth?

Mr. Bushby: You have not qualified him as an expert.

By Mr. Reycraft:

Q. Are you willing to express an opinion, Mr. Boulton?

Mr. Tierney: His willingness to express it doesn't make him an expert.

The Court: I will sustain the objection.

By Mr. Reycraft:

Q. Mr. Boulton, the persons who specialize in chemical and automobile stocks under your supervision, do they consult with you and have you trained them in these fields?

A. They do consult with me, and the staff is largely a staff of men whom I have trained myself.

Q. Are you responsible for such opinions as they express?

A. I am, yes.

Mr. Reycraft: I submit, your Honor, that any opinions which are expressed by persons who work for Mr. Boulton are only such opinions as he accepts and he is required——

The Court: State your question.

By Mr. Reycraft:

Q. Do you have an opinion, Mr. Boulton, with respect to the prospects of du Pont stock on the market?

A. Our opinion is that the long term prospects of du Pont——

[fol. 338] Mr. Cowen: Just a moment. In qualifying the witness, you first asked him if he had an opinion, and the answer is yes or no. There may be some objections before you give the answer.

By the Witness:

A. I do have an opinion, yes.

By Mr. Reycraft:

Q. Are you willing to express it, Mr. Boulton?

A. I am willing to express it.

Mr. Cowen: Your Honor, I think there is a possible objection. I don't think this man has qualified as an expert. If he qualifies as an expert, that is something else again. He says he is not an expert.

I would be willing to take the witness's word for it one way or the other, perhaps, but I would like to hear some of his qualifications, if he has any.

The Court: You will have an opportunity to cross-examine him. Overruled.

By Mr. Reycraft:

Q. Mr. Boulton, if you have an opinion with respect to the long range prospects of du Pont stock, would you please express it?

A. The du Pont stock is an excellent selection in the chemical group for investors who have long-term objectives of sound growth, under good management, in mind.

Q. Has your firm recently made a recommendation with respect to du Pont stock?

A. We presented roughly this conclusion in our bulletin of January 12.

[fol. 339] Mr. Cox: What is the date of that bulletin?

The Witness: January 12. This may well be the bulletin that apprised you of what our viewpoint was. That, I don't know.

Mr. Cox: Was that January 12, 1959?

The Witness: January 12, 1959, yes

I have a copy of the bulletin right here.

By Mr. Reycraft.

Q. In connection with your research work and your recommendation on these stocks, are you familiar with the price earnings ratios of du Pont stock?

A. Broadly speaking, yes.

Q. How do they compare with other stocks in the chemical industry?

A. At the present time they are roughly in line. At times past the price earnings ratio of du Pont stock has been materially higher than that of some of the other chemicals. It is higher today than that of many of the secondary chemicals.

Q. Within the automobile industry, do you have an opinion with respect to the prospects of General Motors stock in the market?

A. I do.

Q. Will you state your opinion, sir?

A. It is practically identical with the viewpoint expressed regarding du Pont stock; a sound, long-term value, representing a strongly managed company.

Q. Are you familiar with the relationship between the market prices of General Motors stock and those of the Ford Motor Company?

A. Broadly, yes.

Q. Will you state broadly what they are?

A. I wouldn't claim any originality of this opinion. This [fol. 340] is a subject that is widely studied by nearly tens of thousands of people.

I think it is generally recognized that General Motors is the strongest of the companies in the industry in point of stability of sales, in point of diversification, and in point of constant maintenance of better than average margins of operating profit.

It is generally felt that General Motors is a company that over a long period of time has proved itself equal to almost any challenge, almost any problem, and that in spite of the difficulties encountered in interim periods of difficulty for the entire automobile industry, that General Motors has an excellent outlook for the very long term.

Q. And compared to other automotive companies, does it generally have a higher or lower price earnings ratio?

A. It generally has a higher price earnings ratio.

Q. Now, with respect to the market prices of du Pont and General Motors stock, in your opinion what are the major determinants?

A. I believe it would be correct to say that the major determinants have been the appraisals by investors en masse, the bulk of investors really, about the appraisal of current profit and current dividends and of the prospects of a future development of earnings and of dividends.

Q. Among these factors are present and prospective dividends one of the major determinants?

A. They are one of the major determinants, yes. That is what I would say.

Q. Are you familiar with the course of the market price of du Pont stock during the summer of 1958?

A. I would say that I am.

Q. Will you describe what that has been, sir?

[fol. 341] A. Du Pont stock has had a vigorous recovery since the summer of 1958, but in this recovery it has still lagged behind the recovery of most of the other leading chemicals.

Q. In your opinion, can you account for any factors which may have contributed to that lag?

A. I think this present action may be one very important element in the lag of the recovery of du Pont stock.

Q. Do you think at the present time that the market has discounted any possible divestiture in this case?

A. Well, if the statement is correct that du Pont stock has recovered less than other chemicals, such as Dow, such as Union Carbide, since last summer, because of the imponderables and doubts cast by these legal proceedings, I think you would have to admit a corollary that this lag has, in part, involved a discounting of any presumed or possible adverse results.

Q. Do you have any judgment as to the amount of any such discounting?

Mr. Cox: May we have the question read?

By Mr. Reycraft:

Q. Do you have any judgment as to the degree of any such discounting?

Mr. Cox: I object to the form of the question. I don't understand whether you are asking how much of the possible discount has already taken place or whether you are asking about the amount of the discount on the price, or just what it is.

If the witness understands, it is all right.

The Court: Do you wish to reframe your question?

[fol. 342] By Mr. Reycraft:

Q. How much of a discounting has already taken place, if you have an opinion?

A. I would be glad to try an opinion. We are here in the realm of guesswork as well as appraisal, and if it is not presuming too much, I would like to say that the opinion is based on a long term study of the earnings of du Pont, some projection of what the earnings may be, and a study of the price earnings ratio that du Pont stock has obtained over a long period of years, and the price earnings ratio today, not only the current earnings but the projected earnings, relating this to broad trends in price earnings ratios of other quality stocks, and particularly other chemical stocks with which the most ready comparison may be made.

Now, I will mention a figure as just a guess figure, and nothing more than that, because these appraisals seldom are anything more than a guess.

I would say that if du Pont stock had maintained its normal ratio to these operating facts of business development in today's market, we would probably find it priced somewhat nearer to $240 a share or to $230, as compared with the present level, which is in the area of $210.

Q. When you made your recommendation within the past few weeks, were you aware of the pendency of this litigation?

A. I will have to answer that one of the elements entering into a recommendation of a stock is the element of overappraisal or underappraisal, and that the fact that du Pont stock has been lagging on the recovery in the chemical group I thought presented a reason for special favorable mention of the stock. The main reason for the mention was, of course, the favorable development of the company itself.

[fol. 343] Q. Now, in reaching your opinion as to the effect of this litigation on the possible price of du Pont stocks, did you consider whether there might be a change in the business relations between these companies?

A. I had to give some consideration to that.

Q. Would you explain that in more detail?

A. Well, I am glad you asked that because it does give an opportunity to say that in the research end of our financial business there is seldom if ever an opportunity to do a complete job.

Research departments do not employ tax accountants, they do not employ tax experts to give them a full report on tax aspects of companies.

They have to do the very best that they can from available public sources. We did use those available public sources in arriving at what I would almost have to describe as a horseback opinion, and we still might not have used that horseback opinion excepting that we felt a less favorable opinion already might be said to have been discounted by somewhat lower than normal price in the market for du Pont stock.

Q. Now, did you take into consideration the possibility

that du Pont's trade relations with General Motors might decrease as a result of this litigation?

A. We did, but we had no exact figures in relation to the scope of du Pont business with General Motors at hand.

Q. But is that one of the factors which contributed to your opinion that du Pont lagged behind the chemical group in its recovery?

Mr. Cox: Let's have that question read.

(Question read.)

Mr. Cox: What factors are you talking about?

Mr. Reycraft: The factor of a possible decrease in du Pont's trade relations with General Motors.

[fol. 344] By the Witness:

A. I would answer that in the negative. It is known that du Pont has substantial business with General Motors. It is also known that du Pont's total sales are in the area of two billion dollars.

As to my own opinion, I would have to say that I share the general view of the investment community and the general view of the chemical industry that the strength of du Pont is such in its product development, in its control of costs, in its originality, in its new business areas that if there should be any change in business relationships—and we do not assume that there is going to be any change in business relationships between du Pont and General Motors—that the change would not be a change that would be harmful to du Pont, because du Pont has such a strategic position in all lines that are important to it, that it is almost impossible to conceive that any significant permanent damage would result.

I doubt that this possibility of a change in business relationships between the two companies has had much weight in Wall Street thinking. I can say it certainly has not had any weight in our thinking.

Q. Mr. Boulton, in the course of your employment, do you make recommendations to institutional investors?

A. We do. That is a very large part of our business.

Q. Do you have an opinion with respect to the influence of the demand by institutional investors on the market generally?

A. I have to have. It is a part of our day-to-day experience.

Mr. Tierney: I object to his qualification to pass on this subject.

[fol. 345] Mr. Reycraft: He makes recommendations to institutional investors.

The Court: Overruled.

By Mr. Reycraft:

Q. In connection with your recommendations, do you follow their purchasing policies?

By the Witness:

A. I do.

By Mr. Reycraft:

Q. What is your opinion, Mr. Boulton, with respect to the influence of the demands of institutional investors on the stock market?

Mr. Bushby: Oh, I think we need some definition for institutional investors.

Mr. Reycraft: Well, take them one by one.

Mr. Bushby: I mean, the question should say what you are talking about—"institutional investors."

By Mr. Reycraft:

Q. Do you have an understanding of what the phrase institutional investors means?

A. There is a wide range of institutional investors and they are not all going in the same direction at the same time. It is complex subject. I think you will find very few people who have every aspect of this subject at their fingertips. I could only talk from our own direct experience.

Q. Do you make recommendations to mutual funds?

A. I do.

[fol. 346] Q. Do you make recommendations to pension funds?

A. Certainly.

Q. Do you make recommendations to eleemosynary institutions?

A. I do.

Q. Now, with respect to these institutional investors, do you have any opinion as to the effect of their demand for common stocks on the future course of the market?

Mr. Bushby: Oh, I object to that. I think in the first place he has got to confine the question to one type of institution at a time. The witness has said they go in different directions.

The Court: I think you ought to break it down, counsel.

Mr. Reycraft: All right.

By Mr. Reycraft:

Q. Start with mutual.

Mr. Tierney: What is the question now?

Mr. Reycraft: The question is:

By Mr. Reycraft:

Q. In your opinion what is the effect of the demand by mutual funds for common stocks on prospective market prices of common stocks?

Mr. Tierney: May I have that question read, please?

(Question read.)

Mr. Bushby: I object as immaterial and irrelevant, your Honor, unless it is directed to whether he knows what their intentions are as far as buying General Motors stocks.

Mr. Reycraft: This man's whole job is to consider trends such as this.

[fol. 347] Mr. Bushby: I am not arguing about that; I am saying the question does not relate to this case.

Mr. Reycraft: Well, it does generally, and maybe we will get down to particulars in a moment.

The Court: He may answer.

By The Witness:

A. I think a very simple answer is that mutual funds almost month by month are buyers on balance.

By Mr. Reycraft:

Q. Will you explain what you mean by buyers on balance?

A. They buy more stock than they sell because they con-

stitute one of the important avenues for the channeling of public savings toward new investments because people are willing to entrust the professional managers who run mutual funds to make choices among securities and to provide a diversification that the average individual, particularly the small investor, himself, does not feel capable of performing.

Q. Now, in your opinion, do the purchases of mutual funds constitute a market support?

A. Of a sort, of a sort.

Q. Now, has it been your experience that when prices of stocks move out of line, institutional investors will become purchasers?

Mr. Cox: I object to the form of the question. I do not know what "out of line" means.

The Court: Sustained.

By Mr. Reycraft:

Q. Mr. Boulton, has it been your experience that when [fol. 348] traditional price earnings ratios change, institutional investors will become purchasers of those with lower price earnings ratios?

Mr. Bushby: Let's have that "institutional investor" out of there.

By Mr. Reycraft:

Q. Mutual funds.

A. Well, it is part of their job to do so. They think that they would like to do so. They are also human beings, and sometimes when price earnings ratios go in the favor of the buyer, it reflects an uncertainty of conditions which affects their thinking too, and you can not say that an important group of institutions may not be sellers at the time when on later appraisal they wish they had been buyers. So it is not a simple thing.

Q. Do you mean that they make mistakes?

A. Yes.

Q. Would you answer with respect to net purchases apply to pension funds?

A. Yes, that applies to pension funds.

Q. In your opinion, do pension funds constitute a continuing source of demand for common stocks?

A. They most certainly do.

Q. How would you evaluate the importance of a demand for pension funds, as compared with other types of stock purchases?

A. It is one of the most important sources of new demand, because pension funds, in the present state of development, are under the compulsion to continually build up earnings assets, so that they are very large buyers of stocks.

They also, of course, are buyers of bonds and other classes of securities.

[fol. 349] Q. Now you have testified that you make recommendations to investors of this type, mutual and pension funds; and let me include the other eleemosynary institutions. Do you find or have you found as a result of your experience that these institutions, eleemosynary institutions are net purchasers?

A. They are.

Q. Now do these investors generally purchase du Pont and General Motors stock?

Mr. Bushby: What one are you talking about now?

Mr. Reycraft: All three.

Mr. Cox: May it please the Court, isn't that a question of fact that Mr. Reycraft can prove in some other way? It seems to me rather a burden to impose on this witness to try to have him tell us what particular——

Mr. Reycraft: I will ask the question in a different way.

By Mr. Reycraft:

Q. In making recommendations to these investors, Mr. Boulton, do you recommend du Pont stock from time to time?

A. We do, yes.

Q. As a matter of fact, have you recently done so?

A. We have, yes.

Q. And would the same answer apply to General Motors stock?

A. The same answer would have applied to General Motors stock a few months ago. We have more recently made the statement that we believe that of the two at the

present time du Pont is the more interesting for new purchasers.

Q. Would you explain the basis for that opinion?

[fol. 350] A. The basis was a very simple one, in that the sales comparison of General Motors retail sales of automobiles, penetration of market, was so outstandingly favorable in the first quarter of 1958 and has changed moderately in the first quarter of 1959, as compared with that good period for General Motors in the first quarter of last year, with a relatively larger percentage of total automobile sales being obtained by Ford in competition with General Motors than was the case a year ago; so we felt constrained to point out that those interested in General Motors should have more in mind that presumably very favorable, certainly—I won't say, "certainly,"—likely much more favorable prospects for General Motors in 1960 rather than have in mind that any surprisingly favorable performance will be obtained in 1959.

We thought that some short term disappointment might exist because of this comparison; and we saw no short term disappointment in the earnings development of du Pont, and we felt that the man who would like to have both stocks might do very well to be getting, for the time being, his General Motors interest through the vehicle of du Pont.

This was cutting it pretty fine, because we like both stocks, and we have been saying so.

Q. In making your recommendations with respect to du Pont stock, do you take into consideration facts relating to taxes paid by those companies?

A. As best we can, without claiming to be tax experts.

Q. Are you familiar with the fact that du Pont pays a tax on the dividends it receives?

A. Yes. The intercorporate dividend tax, you mean?

Q. Yes, sir. Do you have an idea of how much that was last year on General Motors dividends?

[fol. 351] A. I can do a little mental calculation. The tax is 52 per cent of 15 per cent of intercorporate dividends. On the du Pont holding of General Motors, it should come to about ten million dollars.

Q. Now would the existence of that tax involve a lower selling price for du Pont perhaps than might otherwise be the case?

A. In a very slight way.

Mr. Bushby: I object to the question—"otherwise would be"—what does that mean? It doesn't mean anything.

The Court: Sustained.

By Mr. Reycraft:

Q. If that tax were eliminated, Mr. Boulton, in your judgment, might there be any effect on the price of du Pont stock?

Mr. Bushby: I object. There is no way to eliminate the tax, your Honor.

The Court: Sustained.

By Mr. Reycraft:

Q. Mr. Boulton, in the course of following the prices of General Motors stock, are you familiar with what is referred to as the Sloan Secondary?

A. Yes, I am familiar with that.

Q. Do you have an opinion with respect to the influence of that secondary on the market price of General Motors stock?

A. If I remember correctly, it was a very important secondary. There were a large number of shares, somewhere on the order of a million, and there was a good deal of interest in this because of the essential popularity of [fol. 352] General Motors stock. It was received with a great deal of interest in the street.

I do remember the reception of it.

Q. Did you have any occasion to change any recommendation that you made to potential investors on account of the occurrence of that secondary?

A. No, I can't say that we did have any change.

Q. In your opinion, has it had any depressing effect on the market price of General Motors stock?

A. I believe at the time of the offering, there was a decline in General Motors stock. This way a pretty big amount of stock to come on the market all at one time.

Q. How long did that last, Mr. Boulton, if you recall?

A. I will have to scratch my memory about that. My general memory is that the effect was short term.

Q. Would you state what you mean by "short term"?

A. I believe that the stock bent and didn't break, and that after the million shares, or thereabouts—if that was the number of shares—had been absorbed, within a few weeks that it recovered in the market to the former status.

Q. And since then it has been selling normally, as far as this issue is concerned?

A. I think since that time the moves in it have been largely governed by changes in the earnings development of the company.

Q. Are you familiar with the fact that General Motors purchases stock for its bonus plan through the Stock Exchange?

A. I can only say that I know that General Motors has been a major buyer of its own stock. I don't have any knowledge of the number of shares involved.

Q. Do you have any opinion with respect to the influence [fol. 353] on the market prices of that stock which had been exerted by these purchases?

Mr. Cox: Will the reporter please read that question?

(Question read.)

Mr. Tierney: I object to that question. The witness has already indicated that he didn't know what the purchases were.

The Court: Are you referring to the purchases by General Motors of its own stock?

Mr. Reycraft: Yes, your Honor.

The Court: You may answer.

Mr. Tierney: If the Court please, he said he doesn't know.

By Mr. Reycraft:

Q. Do you know, in a general way, Mr. Boulton, the round number——

The Court: Let us find out. If he doesn't, he should say so.

By Mr. Reycraft:

Q. Do you know?

A. If I may—I know it has been in the many millions of shares; and—remember—this is a very big stock. There

were over 280 million shares, so that when you say new buying has been in the many millions of shares, it is not quite so important a point as for a smaller stock.

Perhaps if I could try to be helpful with a generalization—and it is almost a cliche—that any buying is on one side of the supply—demand equation; any selling would be on the other side; and, obviously, any buying, whether done by General Motors funds or by other funds, in the aggregate, is a supportive element to the stock.

[fol. 354] I think that is a simple point.

Q. Now you have related this demand factor to the number of shares outstanding. Is it your opinion that the purchase of a large amount of stock in a company like General Motors, which you have said has a lot of shares, would have less effect than a company with fewer issues of stock outstanding?

A. Yes.

Mr. Tierney: If the Court please, I object to that question.

What do you mean, Mr. Reycraft, by "large amount"?

I object.

The Court: Overruled.

By Mr. Reycraft:

Q. Do you know how many shares of stock of General Motors are outstanding?

A. About 285 million shares, according to my memory.

Am I wrong on that?

Q. Mr. Boulton, considering that fact and the fact that you have already testified that General Motors makes these purchases, do you have an opinion with respect to the influence on the price of that company's stock——

Let me start over again:

In your opinion, does the influence of General Motors' purchases of its own stock have less effect than it would on a company with fewer shares of stock outstanding?

A. Yes, it would certainly have less effect.

Q. Would you care to express an opinion as to the degree?

A. I don't think I could, no. We would need a lot of facts about all these other companies, too.

Q. Now, Mr. Boulton, in the event that a single seller should sell the same number of shares of stock as General [fol. 355] Motors purchases on the market, what, in your judgment, would be the effect on the market price of General Motors stock?

Mr. Bushby: May I have that question read?

(Question read.)

Mr. Cowen: Would you clarify that question, please, What do you mean by "the same number of shares"? I don't think I understand the question.

Mr. Reycraft: I will say, "the identical number of shares".

Mr. Cowen: Identical to what?

Mr. Reycraft: Identical to the number of GM purchases.

Mr. Cowen: That they purchased themselves?

Mr. Reycraft: Right.

Mr. Cowen: Does he know how many they purchased?

Mr. Reycraft: He says he does.

The Court: The question is not limited to a single seller.

Mr. Bushby: How do you know they aren't single sellers now?

Mr. Reycraft: I don't.

The Court: Can you answer that question?

The Witness: I think the question is a simple one.

By The Witness:

A. If a seller comes with the same number of shares for sale, for which a buyer is actually bidding, the question is what effect does this procedure of selling and buying have on the price?

I think the question almost answers itself—no effect whatsoever.

[fol. 356] By Mr. Reycraft:

Q. Mr. Boulton, in your experience in making recommendations to institutional investors, have you found that they object to receiving stock dividends?

A. Some of them do.

Q. Would you explain, if you can, the particular factors which affect their reactions?

Mr. Cox: I object, your Honor. I think Mr. Reycraft is now again asking the witness about the state of mind of people in the institutions, and I think, even as an expert, perhaps the witness can be reluctant to explain.

By Mr. Reycraft:

Q. Mr. Boulton, let me ask you initially whether in making recommendations to investors you make it your business to keep up with their acceptance or lack of acceptance of your recommendations?

A. Well, I have to do that.

Q. Now do you then have an opinion with respect to the reaction of the people you advised as to the receipt of stock dividends?

Mr. Bushby: I think we ought to find out what class of investors you are talking about.

By Mr. Reycraft:

Q. Let's start with mutual funds, then.

Mr. Dallstream: Do you mean by "stock dividends" the stock of the company itself, or stocks of other companies it might own, Mr. Reycraft?

Mr. Reycraft: I will take them one by one.

[fol. 357] By Mr. Reycraft:

Q. Suppose it is a stock dividend, a common stock dividend?

A. Mutual funds don't like to obtain earnings dividends of a type that aren't legally considered earnings dividends, because then they are not able to pass on the moneys to their own stockholders that their stockholders think they should be getting.

Q. Do you know what the tax effect is on mutual funds?

A. I am not aware of the tax law in its detail, as it applies to mutual funds.

Q. Mr. Boulton, in the event that the du Pont Company should pay part of its dividend in stock and retain part of it in cash, and re-invest it in the business, do you have——

Mr. Bushby: What stock?

You haven't defined any stock?

By Mr. Reycraft:

Q. Assume that General Motors has—or that is, du Pont pays out General Motors stock as part of its dividend in lieu of part of its dividend and retains cash, do you have an opinion with respect to the ability of du Pont to reinvest that capital properly?

Mr. Cowen: Can you qualify that?
Mr. Cox: I object to that question.
The Court: Sustained.

By Mr. Reycraft:

Q. Mr. Boulton, if someone were to tell you that as a result of this litigation the price of General Motors stock would drop 25 to 40 per cent, what would be your reaction?

Mr. Bushby: I object to the form of the question. I think you have got to be more specific.
[fol. 358] Do you mean in case this Court should adopt the Government-proposed decree? Is that what you mean?
Mr. Reycraft: That is what I mean.
Mr. Cowen: Why not outline to the witness, Mr. Reycraft—let's ask him if he knows what the Government decree is; and I would like to have your statement of what the Government decree is, too. There have been several different statements.

By Mr. Reycraft:

Q. Are you familiar, in a general way, with the Government's proposed decree, Mr. Boulton?
A. As well as one would learn from the New York Times and the Wall Street Journal, and the financial services. Perhaps it isn't very adequate, but that's all that I do have on it.
Q. From what you know about it, in your opinion could it result in a decrease of price in General Motors stock?

Mr. Cowen: Objection, your Honor.
The Court: Sustained.
Mr. Reycraft: I have no further questions.
The Court: I think counsel is going to ask you a few questions.
Mr. Cox: If I may, Mr. Boulton.

Cross-examination.

By Mr. Cox:

Q. Mr. Boulton, my name is Cox, and I represent the du Pont Company in this litigation. I don't think we have ever met before.

A. I think we haven't. I haven't had that pleasure.

Q. I haven't talked to you about your testimony in this case.

Mr. Boulton: I was interested in your testimony about [fol. 359] the determinants of stock prices on your direct testimony. If I understood it correctly, and I want to be sure I do, so if I don't you tell me—you testified that two important or major determinants of stock prices were the appraisals made by thousands of prospective investors or sellers of present or past earnings and dividends, is that right?

A. That is right. That is a correct statement.

Q. Are those the only things these thousands of people ever think about in making their appraisal of whether they will buy or sell a stock, Mr. Boulton?

A. By no means.

Q. There are other things that they do think about sometime?

A. They try hard to think about those other things in their relation to how earnings and dividends may develop. All of them lead back to that, though.

Q. Ultimately, you think in one way or another, they lead back to that, although sometimes, because of the infirmities of the human mind, is it true that people really make decisions with respect to stocks on the basis of factors that are not directly related to earnings and dividends?

A. That is certainly right, yes.

Q. That is, the theory of stock prices relies to some extent on that basic concept, does it not? You know more about it than I would. Is that right?

A. That is right. It isn't just the earnings and dividend figures. It is the security thereof; the quality thereof; the trend; the general environment of them.

Q. Mr. Boulton, do you recall in your direct testimony that you were asked, in connection with the purchases of

General Motors of its own stock, what the effect on price would be if there was a single seller who was offering on the market precisely the same amount of stock for which [fol. 360] there were prospective bidders, and you said quite probably that it would have no effect at all, did you?

A. I did.

Q. That wouldn't make any difference in that respect, whether there was one seller or several sellers, would it?

A. Correct.

Q. Is that the way price is determined, by the interaction of those who wish to sell at a particular price and those who wish to buy at a particular price; is that the way it happens?

A. I think that is broadly correct, yes.

Q. What happens in a market, Mr. Boulton, a free market, when there are more people who wish to sell at a particular price than there are who want to buy at that price?

A. The price backs away.

Q. What do you mean?

A. It declines.

Q. Goes down?

A. That is right.

Q. If you get an increase in supply on the supply side of the equation without a corresponding increase in demand on the demand side of the equation always at a particular price, the price goes down?

A. It does.

Q. You have to be patient with me. I am not an economist. I am just trying to understand.

A. I often wonder why people are patient with economists.

Q. Mr. Boulton, you said that you were familiar with the proposal or plan the Government has filed in this court as a result of reading the New York Times and the Wall Street Journal and the financial services. Did you read the full text of the plan or a summary of it?

A. I read only a summary.

Q. You are not a member of the bar, are you, or are you, Mr. Boulton?

A. No, I don't have that privilege.

Q. You also testified in response to questions on direct examination that in your judgment this litigation might

[fol. 361] have had some adverse effect on the price of common stock of the du Pont Company, which you thought had already made itself felt in the market.

Do you recall that testimony?

A. Yes, I did say that.

Q. You said you thought that had been, those adverse effects had been discounted—was that the term you used?

A. I used the word "discounting."

Q. What precisely did you mean by that; that there wasn't anything more that could happen in this litigation that might adversely affect the price?

A. I meant simply this: That when the investor is faced with an uncertainty and the outcome of this litigation is an uncertainty until sometime in the future, he never concludes that the result will be exactly this or exactly that. He tends in his thinking to cut somewhere down the middle.

If he is prudent, he tends to say what will happen if things don't work out quite as well as I hope they will work out, and he uses that thought in his evaluation.

Therefore, I think there has been a process taking place which has, in part, represented the investor's attempt to measure the not necessarily exactly measurable effects of a carrying through of a divestment process.

Q. And that answer, in the early part of your answer, did you mean that the prospective investor, informed investor, in your judgment, would consider the plan in this particular situation, or might consider the plan proposed by the Government for the solution of this problem and the plan proposed by the du Pont Company for the solution of the problem and say, well, it is likely that something in between will come out of this? Is that what you mean?

A. Or that it could be either way, and he is having a little trouble making up his mind. I don't have a single [fol. 362] answer. Investors like to be faced with clear cut situations. They dislike being faced with imponderables.

Perhaps I am being helpful here if I mention that in the many services that come into our organization, we have read time and again in recent months that we believe du Pont is a great company, a growing company; we like du Pont's stock, but we are unable to say that we would be buyers of the stock now because the imponderables of a litigation are so great.

Now, these people have not in the words that they put together provided anything convincing to me with respect to how carefully they have studied any of the issues or proposals of the case. The context has rather indicated that it was all too much for them, and they hoped they would be able to make up their minds later, and they prefer not even to be studying now, because these people who write aren't lawyers either, nor are the tax accountants.

The net result has been to subtract a certain amount of normal buying, because, in effect, the investor has been told it would be prudent to wait a little.

Q. The question that I intended to ask you, Mr. Boulton, is whether you mean to say in your testimony this afternoon that there is nothing else conceivable that could happen in this litigation as the result of the proposal before the Court that could or would adversely affect the market price of du Pont and Company. Are you prepared to make that categorical statement?

A. No, I am not. I would not make—I could not make that statement.

Mr. Cox: May I have just a moment? I apologize to you, Mr. Boulton.

Mr. Tierney: We have no cross examination.

Mr. Cox: I have just a few more questions.

[fol. 363] By Mr. Cox:

Q. Do you know enough about the mutual funds to know whether, at least the ones you are familiar with, they diversify their investments in equities in common stocks today?

A. Yes, I know how they diversify their equities. Diversification is a cardinal principle. It is also, a legal compulsion. Under the Investment Company Act, no investment of a diversified mutual fund can exceed five per cent of the assets of the fund when taken at cost.

Q. Do you know whether any of the pension funds with which you are familiar also follow a policy of diversification, either by choice or by reason of any limitations imposed upon them?

A. Yes, I do. They practically all follow a policy of

diversification. Almost the sole exception is a few funds where they have a concentration in the stock of their own company.

Q. Mr. Boulton, was I right in understanding your direct testimony in the sense that you are not in a position this afternoon to predict at any time in the future any mutual fund or pension fund will buy any particular amount of the common stock of any particular company at any particular price—or are you in a position to predict that?

A. I would like to be in a position to predict it, but I am not. I can predict in the case of a particular fund, who may be our client, whom I know very well, but that is a very limited kind of prediction, and that would be only in a specific case.

Q. And, I take it, for a short term ahead?

A. That is correct, yes.

Q. Do you recall your testimony about the secondary offering of Sloan stock, of General Motors stock owned by the Sloan foundation?

A. Yes.

[fol. 364] Q. I think you testified on direct examination that that had some depressing effect on the price which was short term?

A. That is my memory of it, yes.

Q. Mr. Boulton, if that offering of the Sloan stock in General Motors had been followed within the next twelve months by another secondary offering of the same or even of a larger size, would you have expected that that secondo offering would likewise have a depressing effect on the price of the stock?

A. I think it would have had, yes. This isn't a certainty. There is never a certainty in the stock market.

Q. It is prediction?

A. It is an educated guess.

Q. Would I be right in saying, perhaps, to use your phrase, which I thought was rather apt, that is a horseback opinion again?

A. That is correct.

Q. And if in the third year there should be another offering of the same kind of an equal or larger amount, would you expect that it might be followed also by some

depressing effect so far as the market price was concerned?

A. I think that would be a correct assumption.

Q. And if there are repeated offerings year after year for a period of time, you would expect each of them to be followed by some depressing effect of that kind on the same basis, would you not, Mr. Boulton?

A. At least until toward the end of the offering activity.

Q. In formulating your opinion with respect to the present prospects of the du Pont stock, common stock, Mr. Boulton, did you get the opinion of a tax lawyer or a tax consultant with respect to any tax consequences that might follow to the du Pont common stockholders as a result of the Government proposal?

A. We did not.

[fol. 365] Q. You did not?

A. We did not. We rather substituted a conclusion that should there be adverse tax effects, they were largely discounted. Should a way be found to avoid adverse tax effects, that would be all to the good. This is assuming that such a program would carry through, and that we don't know, either.

Q. What kind of a program are you speaking of, legislation?

A. No, I mean, assuming a program of distribution and sale, rather than a trustee carrying through.

Q. You are assuming a method of dealing with the problem which would not impose tax consequences, say?

A. I think we were somewhat influenced by the expressions of so many involved in the case that a strong effort would be made to avoid, a penalizing of the stockholder by taxes.

Mr. Cox: I am grateful to you for your patience, Mr. Boulton.

The Witness: Thank you.

Redirect Examination.

By Mr. Reycraft:

Q. Mr. Boulton, on the assumption that General Motors eliminated all of its bonus purchases immediately, do you

have an opinion with respect to the effect that that would have on the market price of General Motors stock?

A. Will you repeat the question, please?

Mr. Reycraft: Read the question, please.

(Question read.)

By the Witness:

A. I think that would have something between a slightly and a moderately depressing effect on the stock.

[fol. 366] By Mr. Reycraft:

Q. You have testified with respect to the relationship between supply and demand for a stock. Has it been your experience that decreases in price bring about increases in demand?

A. I wish I could generalize about that. It used to be very definitely that decreases in price resulted in decreases in demand. Because the market value was much influenced by individuals, they became afraid as the price went down. The usual reaction of institutions is the opposite of that of individuals. They tend to seek opportunities to step up purchases on the basis that if the committee was right at the higher price, it must be much more correct at the lower price.

Q. You have also testified on cross-examination with respect to the depressing effect of secondaries comparable to the Sloan offering.

Would your judgment be that the effect would be equally short term on each of them?

A. Short term may not be exactly applicable here, because we don't actually have an experience of such long repeated or frequently repeated secondaries over so long a period involving such a great amount of stock as is mentioned here. So that the effect, I don't think short term would be the exact phrase.

Q. You think it would last longer than the few weeks?

A. I think it would last longer than a few weeks, because every sophisticated buyer would know that more was yet to come.

Mr. Reycraft: Thank you, sir.

Mr. Cox: Thank you, Mr. Boulton.

The Court: Any other questions of this witness?

Mr. Bushby: No questions.

(Witness excused.)

The Court: Court stands recessed for ten minutes.

(A short recess was thereupon taken.)

[fol. 367] The Court: Proceed, please.

Mr. Reycraft: Now, if your Honor please, we have two additional applications for orders for the issuance of subpoenas, which I would like to hand up to you.

The Court: Very well.

Mr. Reycraft: May I say, your Honor, with respect to several of these, I believe, if we can work out some arrangement for production of documents, as far as the Government is concerned, we would not require the appearance of the witness.

Mr. Tierney: Do you object to letting us look at those?

Mr. Reycraft: Not a bit.

Your Honor, another one of our witnesses has some documents with him, and rather than proceed without copies of documents, we would prefer to recall Mr. Sumner Emerson, if that is agreeable, and proceed with him.

The Court: You may.

Sumner B. Emerson, recalled as a witness by the Government, having been previously duly sworn, resumed the stand and testified further as follows.

Direct Examination.

By Mr. Reycraft:—(Continued)

Q. Mr. Emerson, referring to Government's Exhibit No. 64, will you state what the present par value of General Motors stock is?

A. One and two-thirds dollars a share.

Q. And referring to the face of Government's Exhibit No. 64, how many shares of stock of General Motors are [fol. 368] indicated to be involved in this offering?

A. 4,380,683.

Q. So that on the present par value, that would be how many shares approximately?

A. That would be three times.

Q. Approximately fourteen and a half million, or fourteen million?

A. Thirteen and a half.

Q. I will refer next to a document which bears the numbers 822 through 841 and which is a memorandum dated December 10, 1954——

Mr. Reycraft: Mr. Reporter, will you mark it as Government's Exhibit No. 67 for identification?

(Said document was marked Government's Exhibit No. 67 for identification.)

By Mr. Reycraft:

Q. Will you describe Government's Exhibit No. 67, Mr. Emerson?

Mr. Cox: The witness should be given an opportunity to read it first.

By Mr. Reycraft:

Q. Yes, will you examine it?

A. It is a 20-page document. I do not know what it covers.

Q. Will you take the time to examine it, sir?

A. Do you want me to read the whole thing?

Q. No, sir. Have you ever seen this document before?

A. Not to my knowledge, I probably saw it at the time it was drawn in 1954, but I have not seen recently.

Q. Well, is this document—do you know whether it is an opinion of your firm?

A. Well, it is on our letterhead. It must be.

Q. Well, will you look at the last page, please?

A. And it is signed by us.

[fol. 369] Q. Well, are you able to testify that it is a memorandum submitted by your firm?

A. Yes, sir.

Q. Will you examine the first page, if you will, and see if you recall whether you were familiar with this memorandum at the time it was written?

(Witness examines document)

By the Witness:

A. Well, I read it at the time it was written, yes.

By Mr. Reycraft:

Q. Did you participate in any way in the formulation of this memorandum?

A. Well, I only know that our usual practice in drawing a memorandum of this importance is to draw it as a draft and to submit it to the various partners of the firm and then have them read it and discuss it in a meeting.

I feel quite sure that I sat in on such a meeting, although I don't remember it.

Q. Well, would you describe the extent of your participation in the rights offering by General Motors of its common stock in 1955?

A. Well, we had quite a number of conferences about the general problem in which I sat in, in the drawing of this memorandum. Then when the compahy decided to go ahead I had a part in the determination of the underwriting group, and in the formation of the underwriting group.

I had some part in the sale of the stock that was laid off during the subscription period. I do not remember exactly what I did.

Q. Well, Mr. Emerson, what I am trying to do is to determine if you are sufficiently familiar with this document, or whether you know it is the opinion of your firm so I may offer it in evidence, so——

A. It must have been an opinion of our firm.

[fol. 370] Q. You can identify it as being an opinion of your firm?

A. Yes, sir.

Mr. Reycraft: I will offer it in evidence.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 67.)

By Mr. Reycraft:

Q. Mr. Emerson, do you recall that at the time this rights offering was being studied other methods of financing were being considered by General Motors?

A. It is apparent from this memorandum that that is true.

Q. Will you state what those methods were?

A. Well, the first paragraph of the memorandum states that we understood that the General Motors Corporation wished to raise somewhere approximately 300 million to 350 million in additional capital in the near future, and states that we had outlined various methods of raising this capital in previous memoranda and that this memorandum is to go further into the matter of a subscription offer of common stock to common stockholders, or by a subscription offer of convertible debentures to common stockholders.

Q. And what was your firm's recommendation?

A. We recommended common stock.

Q. And what was the basis of that recommendation?

A. That from the point of view of the General Motors Corporation it was permanent capital.

Q. That is the sole basis of your recommendation?

A. Well, I could elaborate on that if you want.

Q. Yes; what were the reasons for such an opinion?

A. If a convertible issue had been offered that was a debt [fol. 371] instrument of the corporation, and until converted it was not permanent capital; it had a due date and it would have to be paid off.

If it were converted it would then be permanent capital. If the markets were adverse and it was not converted, then it would be just like offering any other debt instrument—it would have to be paid in due course.

If, however, the company were to offer common stock, they would then and there have raised permanent capital.

Common stock does not have to be paid off. Common stock also does not carry any fixed obligation to pay interest.

Q. Mr. Emerson, how was the price arrived at at which this stock was offered to the stockholders?

A. At the time of this memorandum?

Q. If you know, from the memorandum or from any other source?

A. Well, I imagine this memorandum gives it here somewhere, Mr. Reycraft, but it would take quite a while to find it.

Q. Well, did your firm make a recommendation as to the price at which these stocks should be offered to the stockholders?

A. At the time this memorandum was written?

Q. At any time?

A. After the company had determined to go ahead with the common stock offering we had sessions with the company and when it came time to set the subscription price of $75 a share that was determined by the company.

Q. Was it determined by the company after consultation with your firm?

A. We were having consultations with them and I am sure we indicated that we were willing to underwrite it at a higher price than this if they wanted us to.

[fol. 372] Q. How high?

A. I do not think we came up with a definite recommendation as to price.

Q. Did your firm have any discussions with any stockholder of General Motors with respect to the price at which the stock should be offered to stockholders?

A. No, sir.

Q. Did your firm take into consideration the question whether du Pont would exercise its rights?

A. Yes, sir.

Q. And what bearing did you feel that this would have on the marketing of the issue?

A. Well, if the du Pont Company had not exercised its rights to buy a million shares, then those rights would presumably have been sold. If they had been sold on the New York Stock Exchange, there would have been the impact of the sale of those rights.

If they were sold to us as manager of the underwriting group, then we would have the responsibility of laying off that million shares.

Q. Now the million shares you are referring to would be three million shares, in terms of present par value, is that correct?

A. Yes, sir.

Q. Did you make any computations with respect to the cost of laying off the stock on various contingencies; that is, for example, in the event that du Pont did not exercise its rights, did you make any computations with respect to the cost of laying off that stock?

A. Well, I don't know at that time whether we had worked out with the General Motors Corporation what the underwriting fee would be.

It was a split fee, the type that was discussed this morning.

[fol. 373] Q. May I call your attention to Page 8 of Government's Exhibit 67, Mr. Emerson?

A. 67?

Q. Yes, sir, the one you have in your hand, I believe.

A. That is labeled "65".

Q. It is mislabeled. It is the memorandum we are talking about.

A. Page 7?

Q. Page 8, sir.

On the page you are looking at, in the second paragraph, is there a column headed, "Stock Laid Off or Unsubscribed?"

A. Yes.

Q. Is there another headed, "Total Fee at 1⅓ per cent, plus 1⅔ per cent?"

A. Yes.

Q. Will you explain what that table indicates?

A. I haven't computed it out to verify it, but what I believe it means is that if the stock taken up by the underwriters, either as unsubscribed stock, or as layoff stock, had been 10 per cent of the offering, and had underwriting fees worked out that were 1⅓ per cent of the subscription price for the standby fee, and 1⅔ per cent for any stock handled by the underwriters, the resulting computation would have equaled 1½ per cent of the issue at the subscription price.

Q. Now in the event that ten per cent of the stock was laid off, what would the total fee have been?

A. In dollars?

Q. Yes, sir.

Never mind. Use the percentage, since it is indicated on the document.

A. 1½ per cent.

Q. In the event that 50 per cent would have to be laid off, what percentage would have been charged by Morgan Stanley?

A. 2.17 per cent.

Q. How much would 50 per cent of this offering have amounted to?

A. 2,190,341½ shares.

[fol. 374] Q. And three times that amount, in terms of current par value stock?

A. Yes, sir.

Q. And that would be in the area of seven million shares?

A. Somewhere in that area.

Q. So that your firm anticipated that you might have to lay off as much as seven million shares of General Motors common stock in this rights offering?

A. No, sir. We did not anticipate it; we computed what would happen were that eventuality to work out——

Q. You considered that you might have to do that, is that correct, sir?

A. We did not consider it a probability.

Q. You considered it sufficiently within the realm of possibility that you computed a price which you would charge to undertake that, is that correct?

A. That is correct.

Q. Will you apply the percentage fee for a 50 per cent layoff to the then market price of General Motors stock?

A. You can't, because you don't know at what price the layoff would have taken place.

Q. Let me ask you this question: Are these percentages applied to the subscription price?

A. Yes.

Q. They are; so that you could compute the cost in terms of what the subscription price was?

A. Yes.

Q. That would be 2.17 per cent times $75?

A. Well, the subscription price had not been set then.

Q. Was it ultimately set at 75?

A. It was; but these underwriters' fees were not the final fees.

Q. However, these were the fees which you indicated to General Motors might be the ones you would charge, is that correct?

A. Yes, but I just had a chance to glance at the preceding [fol. 375] page; and this is on the assumption—you see, I haven't read this in years.

"For the purposes of the present discussion, assuming a subscription price of approximately 15 per cent under the market."

Now the actual subscription price was about 26 per cent

under the market, so that these assumptions were never—they never amounted to anything.

Q. But you did consider that on a 15 per cent price under the market, which is less than you actually sold it for, you might have to lay off as much as 50 per cent of the stock, is that correct?

A. There was that possibility.

Q. And you did compute a fee, which you had sufficient confidence in to refer to the General Motors Corporation?

A. That is correct.

Q. How much stock, actually, was unsubscribed in the offering as it was made?

A. Unsubscribed?

Q. Let me do that again.

How much stock was actually laid off?

A. 477,040.

Q. And that is in terms of $5.00 par value?

A. Yes, sir.

Q. And in terms of present shares of stock, it would be three times as much?

A. Yes, sir.

Q. Mr. Emerson, when did your firm first learn what action du Pont would take with respect to the rights that were received under this offering?

A. I don't know the exact date, but it was just a day, or, at the most, two days before the final terms were going to be negotiated.

Q. Was there some doubt as to whether they would exercise these rights?

A. Very greatly; very much.

Q. And was any indication given to your firm of the [fol. 376] amount at which du Pont would be willing to subscribe to this stock?

A. There had been no indication given to us whatever.

Q. Did they ever give such an indication to your firm?

A. No, sir. As I remember it, we learned what du Pont was going to do by reading the news ticker.

Q. Do you know of your own knowledge whether du Pont advised the General Motors Corporation or your firm that they would subscribe to this stock if the offering price was $90.00?

Mr. Cox: Mr. Reycraft, you have a document on that. Why do you ask the witness that question?

Mr. Reycraft: I would like to know if he knows, Mr. Cox.

Mr. Cox: He knows now, because he has seen the document.

Are you asking him about what he knew at that time?

Mr. Reycraft: If he didn't know at the time, I would like to know that.

By Mr. Reycraft:

Q. Did you learn at a later time what du Pont would do with respect to price, Mr. Emerson?

A. We read on the news ticker that du Pont expected to exercise their rights. What limitations their Board of Directors imposed on that subscription, I don't know when we learned it.

Q. You did ultimately learn that the du Pont Company would subscribe at a particular price, did you not?

A. There is a document which you took from our files which indicates that the action of the du Pont Board was [fol. 377] that they would exercise their rights, providing the subscription price was not above 90.

Mr. Reycraft: I will offer that document when we have sufficient copies; but rather than raise questions, I will not at this time.

By Mr. Reycraft:

Q. Now what relation to the market price of General Motors stock at that time was $90, what percentage, if you will?

A. You mean on the date that du Pont determined——

Q. On the date of the offering period.

A. Well, the subscription price was twenty-six and a fraction per cent under the market at the time.

Q. Which would make it around $100?

A. It was around $102.

Q. Did $75, as the subscription price, represent your firm's judgment of the highest price at which that stock could be sold?

A. No, sir.

Q. It did not?
A. It did not.

Mr. Reycraft: I will next refer to a document which bears the numbers 848, 849 and goes through 854; and it is entitled, "General Motors Corporation Underwriting Fees, December 23, 1954."

Will the reporter please mark this as Government's Exhibit 68 for identification?

(Thereupon said document was marked Government Exhibit 68 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, in the event that du Pont had not exercised its rights to acquire this one million and now three [fol. 378] million shares of stock, was there a market for these rights?
A. That would have depended on the subscription price.
Q. Was there, in fact, a market for rights on that offering?
A. Yes, sir.
Q. Did the rights retain a value throughout the subscription period?
A. Yes, sir.
Q. And did the underwriters support the market price of those rights?
A. We purchased rights in the open market.
Q. For what purpose?
A. To exercise them and lay off the resulting stock.
Q. And what is the ultimate purpose of the purchase of rights?
A. To distribute that stock effectively rather than have the rights, shall we say, dumped on the market; to provide an orderly market for rights for the stockholders of the General Motors Corporation who wish to sell.
Q. In other words, any stockholder of the General Motors Corporation who wished to sell his rights was assured that they would have some value, is that correct?
A. No, sir, that is not correct. The market could have been very adverse during the subscription period. The value of the rights could have gone to zero. It didn't.

Q. To what extent were the underwriters obliged to support—did they undertake to support these rights?

A. There was no undertaking to support them.

Q. Why did they do it?

A. In their best interests; in the interests of the General Motors Corporation.

Q. Would it be in order to insure a successful offering?

A. I couldn't hear that.

[fol. 379] Q. Would it be in order to insure a successful offering?

A. It was with the idea of providing the stockholders of the General Motors Corporation with an orderly market for rights that for any reason they had to sell or wanted to sell.

Q. I am not clear on this—the extent to which the underwriters undertook to buy rights for more than would otherwise have been charged if there had been no support? Was there any limitation on the underwriters' obligation?

A. There was no obligation of the underwriters to buy rights?

Q. This was voluntary?

A. It is entirely at the discretion of the manager.

Q. There is no contract with the company to form any part of the underwriting agreement?

A. There was no contract with the company that obligated the underwriters to buy a single right. However, the underwriting agreements had been set up in contemplation of such purchases, and a fee had been provided for stock that was laid off in connection with such purchases; and it was certainly contemplated that we would do it, but we were under no obligation to do it.

Q. Did the company know that you would do it before the issue was offered?

A. They knew we had the power and that we expected to do it.

Q. You had told them that you would do it?

A. I don't know exactly how it was phrased to them, Mr. Reycraft; but they certainly would have been surprised if we hadn't done it

Q. Would they have been disappointed, do you think?

A. I think they would have been.

Q. Now, if you can, Mr. Emerson, as to the stock which

was laid off, was there any particular group of persons to [fol. 380] whom this stock was sold or any particular class of investors?

A. Oh, it was sold so broadly, Mr. Reycraft—through the underwriting group and through other dealers, that we had no knowledge of where each underwriter and dealer was selling stock.

We don't know their customers.

Q. Were the rights purchased all by one firm?

A. We would have had the say as to the purchase of rights.

Now, whether we actually bought rights on other exchanges, through other firms——

Q. For example, this was quite a large syndicate, was it not?

A. Yes, sir.

Q. Did each of the firms in the syndicate purchase rights?

A. No, sir, they were forbidden to.

Q. Did your firm purchase rights?

A. We buy them. The manager is the only one allowed to buy them. No one else can buy rights, except with the manager's permission. The reason for that is that if 330 underwriters start out to buy rights, it could easily have a manipulative effect on the market, and therefore we forbid it in our contracts.

Q. You mean the price might go up?

A. It might have that effect, yes.

Q. Are there any SEC regulations affecting the exercise of such rights?

A. Yes, sir.

Q. Will you describe them?

A. They are pretty complicated. They provide, in essence, that the buying shall be done by one source, the manager; that the manager shall not go into the market and buy rights until an independent market has been established, which could be defined as a day of free trading in rights, or it [fol. 381] might be a shorter period than that; but an independent market for the rights must be established before the manager steps in to buy.

Q. Do you know how long after the rights were offered that your firm stepped in to buy?

A. I can probably find it in this memorandum.

Q. Will you, sir?

Mr. Emerson, perhaps it would save time if I showed you a document which bears the numbers 950 through 952.

Mr. Reycraft: Will the Reporter mark this for identification as Government's Exhibit No. 69?

(Thereupon said document was marked Government Exhibit 69, for identification.)

By Mr. Reycraft:

Q. Preliminarily, would you identify Government's Exhibit 69 for identification, Mr. Emerson?

A. This is a tabulation of the price of rights during—I assume during the full subscription period. It shows that the first purchase of rights by Morgan Stanley & Company was on February 16, 1955. It don't know what day the—the date of the prospectus was February 8th, 1955. Rights started trading on that day. We apparently, from this tabulation, bought no rights the first day—until February 16th.

Q. Now will you turn to the next page of this document, Mr. Emerson,—the one bearing No. 951?

A. Yes, sir.

Q. Will you describe what that table indicates?

A. Frankly, I can't.

Q. There is a heading "G.M. Shares, Incorporated," and the date March 9, 1955; and under that is the sentence "Purchase of Rights."

Are you familiar with G. M. Shares, Incorporated?

A. Only in a general way. That is why I say I can't [fol. 382] explain it. It is a very complicated transaction. One man only in our office handled all of the transactions with GM Shares, Incorporated. It would take a lot of time to familiarize myself with it.

Q. Do you know whether that company exercised its rights in this offering?

A. Well, as I remember it, it issued rights to its own stockholders in order to get money to exercise the rights it would received on the General Motors stock. There were three classes of stock of GM Shares, Incorporated, the

classes were different, and I do not remember the very complicated details of that transaction.

Q. Do you know whether the rights that were issued to GM Shares, Inc. were all exercised by that company?

A. To the best of my knowledge, they were.

Q. So that none of those were exercised or laid off by Morgan Stanley?

A. I don't think so. As I remember it, we bought rights of GM Shares, Inc. and through some complicated transaction that I would hate to have to explain, obtained GM's stock which was laid off.

Q. Well, the point I wish to reach is whether the stock to which GM Shares was entitled under its rights was ultimately sold on the market or whether it was ultimately taken up by stockholders of GM Shares, Inc.

A. According to my memory, it was partly taken up and partly purchased through us, through this very complicated arrangement.

Q. You don't know, then, the amount of stock to which GM Shares was entitled, which was sold on the market?

A. I do not know.

[fol. 383] Q. All right, sir.

Turning to the third page of this document, 952, do you know what that document indicates?

A. Well, this shows purchases of rights, and it apparently shows purchases of rights by us as manager earlier than the date I have previously given. Apparently the tabulation I had seen before referred only to purchases on the New York Stock Exchange. That indicates that we purchased rights on February 9, 1955 over the counter, and from GM Shares, Inc.

Q. Now, returning to a question which I asked you earlier, do you know the class of investors or whether there was any particular group of investors to whom you sold the stock which was laid off in this offering?

A. We sold it to all types of investors.

Q. Was it distributed through the underwriting group?

A. Through the underwriting group, and Morgan Stanley made retail sales, too.

Q. Would this procedure be analogous to a secondary distribution?

A. In certain ways, but in certain ways only.

Q. Well, would you state what the certain ways are in which it is analogous?

A. Well, in the case of a secondary offering, an underwriting group purchases the stock. They have the whole block and they sell it. In this case, it seems to me that it is not analogous, because, in the first place, we were not obligated to purchase rights.

We purchased them, a certain amount each day over a period of twenty days, so that it was a series of sales, none of which we were obligated to make.

Q. Now, when you purchased the rights over the period of 20 days, were they exercised immediately?

[fol. 384] A. No, they weren't exercised immediately, but within a day or two. If our long position got uncomfortably big, we would lay it off.

Q. You didn't put them in the safe or anything? You were looking for an opportunity to exercise them so you could sell the stock, were you not?

A. I don't understand the question.

Q. I am trying to develop whether there was any urgency in your exercising the rights and selling the stock which you received thru the exercise of rights.

A. Well, the exercising of the rights is a mechanical thing. You put up money and you take down the stock. Now, if we had bought, let's say, a million rights, we could then sell the equivalent amount of shares whether or not we had exercised them.

We would sell the shares, in effect, short, knowing that we had the rights and were going to get delivery of the shares at a later date.

Q. But in order to protect your financial position, you would have to cover these sales at some time?

A. Well, having bought rights, we would not want to be heavily long of rights: and if we had accumulated what we felt was a large amount, we would then have a layoff and sell the equivalent number of shares.

Q. Returning to my question concerning the analogy between a secondary distribution and a layoff procedure under a rights offering, you have testified, I believe, that one difference is the fact that you had 20 days in this case, is that correct?

A. That is true, and also the fact that in a secondary, you have a commitment to sell a certain number of shares.

At least you buy them, and if you don't sell them, something unfortunate happens. Here we were not obligated to [fol. 385] make any purchases at all. We only purchased as it seemed wise to do so.

Q. Suppose Morgan Stanley had, in fact, made no purchases of rights whatever during this offering period, would this have resulted in any problem of relations with the issuer?

A. Well, I think we would have been guilty of bad faith. The issuer expected us to do it.

Q. So that you had a moral obligation, did you not, at least?

A. We had led them to believe that we were going to do it, and therefore, we would do our best to do it, yes, sir.

Q. It was as good as a contract as far as you were concerned, was it not?

A. No, I don't think so. Suppose the market had gone down below 75? Then we were under no obligation at all. The rights have no value then.

Q. But to the price of 75, you were obligated, were you not?

A. No, sir.

Q. A moral obligation?

A. We were obligated to the best of our ability to provide a market for rights.

Now, in order to do that, we go through a process which we call building a book, which means getting the underwriters and dealers who are not underwriters to enter orders with us, and to the extent that we have a book, which are orders, we can lay off. Now, if we didn't have a book, we couldn't lay off, and therefore, we wouldn't buy rights.

Q. But you build up a book, which means you——

A. We try to build up a book, and we succeeded in building up a book.

Q. Which means you get orders in advance?

A. Yes, sir.

Q. And you are generally very successful in doing this, [fol. 386] are you not?

A. We hope so.

Q. Well, you were with respect to this issue?

A. Yes, sir.

Q. Now, I would like again to see if I can just pin down one final point with respect to the participation of the underwriting group in the stock which was laid off.

Did that group have any obligation to participate in this distribution?

A. No obligation.

Q. You would call them up, would you not, and say, could you take so many shares, or perhaps they would call you up?

A. We told them at the underwriters' meeting, which is held during the period before the registration statement becomes effective, that we presumed we would have heavy layoffs of stock. We didn't know at that time, of course, whether or not du Pont was going to take up their rights. We told them that we expected them as underwriters to help us build up a book.

Now, they didn't in every case do it. I think there was a document that you placed in evidence this morning that showed what those orders were, and there were a number of underwriters there that gave us no orders. However, by and large the underwriting group did give orders, and it is to their advantage to do so, because they are getting a concession on the stock which they sell.

Q. They are sellers and they make a profit when they make a sale, is that correct?

A. That is correct.

Q. So they have a real inducement to place these orders?

A. Yes, that is correct.

Q. So while they had no obligation, there was no real difficulty in building up a book for orders of this issue of [fol. 387] stock?

A. I don't remember whether there was any difficulty or not. There has been in some issues. I would say from my memory that it was not difficult in this particular case.

Q. And whatever difficulties there were, you surmounted them?

A. I beg pardon?

Q. I say, whatever difficulties there were, you surmounted them?

A. Yes, although this record wouldn't necessarily prove that. If our book had disappeared we would just have stepped out of the market and not bought any rights, and

I don't know whether that took place here or not. I don't think it did, but I am not sure.

Q. I am not sure I quite understand that statement. Would you repeat that, please?

A. If during the subscription period, Morgan Stanley's book had disappeared, in other words, we had filled up all the orders, had no further orders——

Q. You still had rights.

A. Then we would suddenly stop buying rights.

Q. That did not happen, did it?

A. I don't know. I don't think it did, but I don't know. I would have to look these documents over to answer that question.

Q. Well, I believe Government Exhibit No. 69 indicates that Morgan Stanley was buying rights on February 25th, does it not?

A. We were apparently buying rights throughout the subscription period, after the first day.

Mr. Reycraft: I offer Government's Exhibit Nos. 64, 65, 66, 67, 68, and 69 in evidence.

The Court: They are admitted.

(Said documents, so offered and received in evidence, were marked Government's Exhibits Nos. 64, 65, 66, 67, 68 and 69)

[fol. 388] Mr. Bushby: I will ask that this document be marked Defendant's Christiana Exhibit No. 2 for identification.

(Said document was marked Defendants' Christiana Exhibit No. 2 for identification.)

Mr. Bushby: I show you Christiana Exhibit No. 2 for identification, being a photostat of two pages of a prospectus, and ask you if you will identify it as two pages from the prospectus from this General Motors' rights offering you have been discussing?

The Witness: The first page is the cover page of the prospectus, and the second page is Page 4 of the prospectus.

Mr. Bushby: And Page 4 contains a paragraph called "Purpose of Issue," does it not?

The Witness: Six paragraphs.

Mr. Bushby: Well, the heading "Purpose of Issue," with paragraphs under it.

Do you consider that Purpose of Issue was an important section of the prospectus?

The Witness: Very important.

Mr. Bushby: From the standpoint of interest in the purchases?

The Witness: Very important; yes, sir.

Mr. Bushby: I would like to offer this exhibit in evidence, if your Honor please.

Mr. Reycraft: No objection.

The Court: It is received.

(Said document, so offered and received in evidence was marked Christiana Exhibit No. 2.)

Mr. Bushby: Now, would the reporter mark this for identification Christiana Exhibit No. 3.

[fol. 389] (Said document was marked Christiana Exhibit 3, for identification.)

Mr. Bushby: Mr. Emerson, in the case of a secondary offering, is there any section of the prospectus where it is registered similar to that one for the purpose of issue?

The Witness: Certainly not comparable to this one. It might indicate what the seller intended to do with the funds as received. It might be for inheritance taxes. It might be for diversification.

Mr. Bushby: But that would not be of any particular interest to the purchaser in a secondary offering where the company was not to get the money, would it?

The Witness: It would be of interest only in this way, that if there was a valid reason for sale then the purchaser would feel more confident in going ahead than if there seemed to be no valid reason for sale and somebody was selling just because they thought the market was going down and this was a good time to get out.

Mr. Bushby: I show you Christiana Exhibit No. 3 for identification and I ask you if that is the covering page and page 4 of a prospectus in connection with a secondary offering of General Motors common stock.

The Witness: It is.

Mr. Bushby: And the statement on page 4 is the statement of why the seller was selling?

The Witness: Yes, sir.

Mr. Bushby: I offer that into evidence, your Honor.

Mr. Reycraft: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Christiana Exhibit No. 3.)

[fol. 390] Mr. Bushby: That is all I have.

Mr. Cox: Mr. Emerson, from examining Government's Exhibit 64, can you tell us when or approximately when it first became known in the market that this secondary offering was going to be made?

The Witness: 64 does not refer to the secondary period.

Mr. Cox: I am sorry. I was mistaken. I mean this rights offering of General Motors.

The Witness: I do not think it gives it.

Mr. Cox: Do you have any recollection of about when that was?

The Witness: I have notes in my pocket that might indicate it.

Mr. Cox: All right, will you look at those notes and tell us?

The Witness: This is an announcement of the offer?

Mr. Cox: Yes, the announcement of this rights offering.

The Witness: It was announced after the closing of the Stock Exchange on January 3rd, 1955.

Mr. Cox: Now, can you tell us in what direction the price of the common stock of General Motors moved between that date and the period covered by this offering?

The Witness: Well, on January 1st, the General Motors stock closed at 105⅛. It was up several points that day because people thought there was a possibility of a stock dividend. When they found that there was no stock dividend, but instead a rights offering, the stock went off about 4½ points the next day.

[fol. 391] It continued downward in price for several days.

By Mr. Reycraft:

Q. Would you read the prices, Mr. Emerson, if you have them there?

A. For every day?

Q. For how long a period are you discussing?

A. Well, these notes cover a period of three months, roughly.

Q. May I examine them?

A. They go beyond there, I guess. Now, those—no, that is something else. They go to the 17th of March from the beginning of January.

Mr. Cox: Mr. Reporter, will you mark this as du Pont Exhibit No. 2?

(Thereupon said document was marked du Pont Exhibit 2, for identification.)

Mr. Cox: I have to show this to other Counsel.

(Members of Counsel examined document.)

Mr. Cox: Mr. Emerson, I am going to hand you back this document now that it has been marked du Pont No. 2, for identification, which is headed, "General Motors Corporation Common Stock, $5.00 Par Value; Price Range Related to 1955 Rights Offering to Share Holders."

I ask you whether that document was prepared by you or under your direction.

The Witness: It was prepared in our office.

Mr. Cox: Are you satisfied that the prices shown thereon are accurate?

The Witness: They have been carefully checked.

Mr. Cox: Now, without reading every price to us from the document, Mr. Emerson, which I will offer in evidence at the [fol. 392] end of your testimony, will you tell us again what the range in prices was from the date of the public announcement to the end of the offering, when the underwriting was concluded?

The Witness: Well, January 3rd was the day on which the announcement was made of the rights offering. It was made after the close of the market. The market on the Exchange closed that day at 105⅛. The market went down rather precipitously for a few days and got down to a low of 92.

The market then strengthened when the registration statement became effective, which I think was February 8th. The stock closed that day at 99⅛.

The initial layoff was the 9th of February. The stock closed that day at 97⅞.

After several layoffs, because of the impact of those layoffs, the stock went down, hit a low of 92¼; moved back up again toward the end of the subscription period on March 7, 1955.

The rights expired. The stock closed that day at 96⅞. After that the final layoff was on March 9, 1955, which would have included the unsubscribed shares. That layoff was at 94½.

The following week the market was somewhat softer. It hit a low of 89½.

Mr. Cox: Is that the last week shown on your chart?

The Witness: The last date shown on this chart is March 17th. It had come back then and closed at 93¾. On that day the Dow Jones average was 405.23.

The day the announcement took place, January 3, the Dow Jones average was 408.89. In other words, the Dow Jones [fol. 393] average went off in that period about 3½ points, which would be less than one per cent.

General Motors went off in that period 105⅛ to 93¾, which would be about 11 per cent.

Mr. Cox: That is all.

By Mr. Reycraft:

Q. Mr. Emerson, do you have any notes which indicate what the price activity of General Motors stock was after the dates in this exhibit?

A. I do not.

Q. However, the last figure you have here is 93⅞, which it the old par value, $5 par value stock, which at present market prices would be in the neighborhood of 31, would that be correct, a little over 31?

A. Well, there are other factors that might be involved, but roughly——

Q. Would that be a fair appraisal?

A. When you split a stock you change its market attraction, so that it is not strictly so, but it is roughly correct.

Q. Well, it is probably as good as we can do, isn't it?

A. It is as close as I would care to guess.

Q. And what is General Motors stock selling for now, do you know, sir, today?

A. I do not know. It is around 45, 46, in that area.

Q. So that in terms of current par value stock, approximately 14 million shares were disposed of during this period, and whatever decline there was in the price of General Motors stock is——

A. I do not think you can say 14 million shares were disposed of.

Q. Well, what would you say?

A. I would say had the stock been split the problems [fols. 394-395] would have been utterly different. I think you can say only four million odd shares were disposed of.

Q. Well, four million odd shares times a price of about a hundred?

A. Yes.

Q. In terms of par value, I think we probably could convert the figure to existing shares, don't you think?

A. I do not know if that is strictly a fair assumption.

Q. You think there are some other factors?

A. There are other factors that would come in had the stock been split at that time.

For instance, it would have been a harder job to have handled this underwriting and laid off the equivalent amount of stock if you were to multiply all those share figures by three.

Q. There would be an additional number of transactions, in other words?

A. It would have been a bigger job to do.

Q. Would you have given up if there had been that number of shares?

A. No, sir; no, sir.

Q. Well, my point is, Mr. Emerson, do you recall when in the equivalent terms, 1⅔ par value of stock, the price of General Motors stock went back to the price at the opening date of the offering?

A. I don't know.

Q. It surely has done so at some time since this?

A. Oh, yes.

The Court: The court will adjourn now.

(Whereupon an adjournment was taken in the above-entitled cause until Friday, February 20, 1959, at 10:00 o'clock a.m.)

[fol. 396]

Transcript of Proceedings of February 20, 1959

The Clerk: Case on trial.

The Court: Counsel may proceed.

Mr. Andrews: We call Mr. Hall, your Honor. Would the reporter mark for identification Government Exhibits 70 and 71?

(Thereupon said documents were marked Government Exhibits 70 and 71 for identification.)

DUDLEY A. HALL, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Andrews:

Q. Mr. Hall, could you state your full name and address for the record, please?

A. Dudley A. Hall, Boston Management Research Company, 111 Devonshine Street, Boston, Massachusetts.

Q. Mr. Hall, are you appearing here today under subpoena?

A. Yes, I am.

Q. Would you tell us what your present position is with this Boston Management and Research Company?

A. My present position is assistant to the treasurer.

Q. Now, I hand you two exhibits marked Government's Exhibits 70 and 71 for identification. Would you examine those exhibits and see if you can recognize them?

A. Yes. I do recognize them. They are extracts from a study of college and university endowment funds which my organization prepares.

By Mr. Andrews:

Q. For what years are those studies?

I think I handed you two exhibits. Would you identify them one by one?

[fol. 397] A. That is correct. They are June 30, 1957 and June 30, 1958.

Q. Would you describe the studies that you have in your hand, Mr. Hall?

A. The two studies are essentially similar. The first exhibit in each one contains a breakdown by size of the endowments included in the study. The second listing includes the colleges——

Q. Mr. Hall, would you refer to them by table when you refer to listing?

A. Yes. I am sorry. Table 1 includes a listing of colleges and their total endowments. Table 2 is a summary diversification table which includes a breakdown by groups of the colleges included in the study.

Table 3 is a list of selected colleges and how their common stocks are invested in various types of investments.

Table 4 is a listing of the ten largest common stock holdings from the point of view of market value.

Q. Would this be true of both studies, the tables that you have given? In other words, would the other study for Table 1 contain similar information as you have just described?

A. Yes, sir. That is correct.

Q. Mr. Hall, would you tell us what colleges or universities you have included in this study?

A. In the most recent study, which is of June 30, 1958, we have included 68 colleges which are somewhat representative of all the colleges in the country. They are from all over the country. They contain or represent, with one exception, colleges with endowments of five million dollars or over.

Q. I see. Does this include all colleges with endowment funds of five million dollars or over?

A. No.

Q. Is this study prepared regularly by your firm?

A. Yes, sir, we prepare the study as of June 30 every year.

[fol. 398] Q. Is the study you have just described similar to the other studies that have been prepared for prior years?

A. All studies roughly follow the same pattern.

Q. And would you describe briefly how this study is prepared by your firm?

A. We obtain the information directly from the colleges concerned.

Q. For what purposes does your organization prepare this study?

A. In general we do it as a public service to provide people who are interested in this type of information with a ready source of this type of information.

Q. Mr. Hall, would you turn to what you have just described as Table 4 in either one of those studies. Take the 1957.

Mr. Tierney: Identify the study by exhibit number, will you?

By Mr. Andrews:

Q. Mr. Hall, would you identify the exhibits as to the exhibit number, which is for which year?

A. The comprehensive study or extract of the study of June 30, 1957, is listed as Exhibit 70, and the same information at June 30, 1958, is listed as Government's Exhibit No. 71.

Q. Now, will you go to Exhibit 70 to table 4 in that exhibit?

A. Yes, sir.

Q. Would you tell us again briefly what is contained in Table 4?

A. Table 4 is a listing of the ten largest common stock holdings in the colleges involved from the point of view of market value.

Q. Mr. Hall, is General Motors stock among those top ten that you have just described?

A. Yes, it is.

Q. Mr. Hall, is du Pont stock among those top ten you have just named?

A. Yes, it is.

[fol. 399] Q. Mr. Hall, is Christiana and Delaware stock among those stocks you have just named?

A. Yes.

Mr. Bushby: I object. There is no such thing as Christiana and Delaware stock. You just misspoke.

By Mr. Andrews:

Q. Yes, just Christiana.

A. Yes, sir, Christiana Securities.

Q. Turning to Exhibit No. 71, would you please refer to the same table?

Are the same stocks listed that you have just enumerated in that table as among the top ten?

A. Yes, sir, they are.

Mr. Andrews: I have no further questions.

Your Honor, I offer Exhibits 70 and 71 into evidence.

The Court: Do you wish to cross-examine?

Mr. Gribbon: Yes.

By Mr. Gribbon:

Q. Mr. Hall, would you please refer to Table 4 in each of Exhibits 70 and 71?

Now, as I understand it, Table 4 in Government Exhibit 70 indicates the value of the holdings of certain educational institutions as of June 30, 1957?

A. Yes, sir, that is correct.

Q. And Table 4 of Government Exhibit 71 shows the holdings of a selected group of educational institutions as of June 30, 1958?

A. Yes, sir.

Q. How many institutions were included in your 1957 study that is recorded in Government Exhibit 70?

A. In the 1957 study 56 endowment portfolios were used.

Q. And in the 1958 study, how many endowment portfolios were used?

A. Sixty endowment portfolios.

Q. Two more than in the 1957?

A. Four more, I believe; 56 and then 60.

[fol. 400] Q. And the greater number were included in the 1958 study?

A. That is correct.

Q. Would you refer to Table 4 in each of these exhibits, and tell us whether the investment of these selected endowments in Christiana Securities—what it was for 1957?

A. From the point of view of market value?

Q. Market value.

A. In 1957 the figure for Christiana Securities was 33.1 million dollars.

Q. And by June 30, 1958, a year later, what was the market value of the investment of these institutions in Christiana?

A. June 30, 1958, the total market value of Christiana Securities was 20.4 million dollars.

Q. So there was a decrease of something like 13 million dollars?

A. Yes, sir, that's correct.

Q. And looking at duPont, would you tell us what the investment of these institutions was in duPont in June 1957, as against June 1958?

A. At June 30, 1957, du Pont was represented by 31.8 million dollars; at June 30, 1958, duPont was represented by 20.2 million dollars.

Q. So that there was a decrease in the holdings of duPont during the year ended June 30, 1958?

A. That is correct.

Mr. Metzger: I object to that statement your Honor. The witness has testified that these reflect the market value figure. There has been no showing that the holdings decreased father than the market value.

The Court: You will have an opportunity to cross examine.

Overruled.

By Mr. Gribbon:

Q. Would you look at the figures on Table 4, reflecting [fol. 401] the holdings of educational institutions in General Motors stock?

First, what were those holdings as of June 30, 1957?

A. At June 30, 1957, the figure for General Motors was 29.7 million dollars.

Q. And at June 30, 1957, what was the value of the holdings of these institutions in General Motors?

A. You mean 1958?

Q. 1958.

A. June 30, 1958, the figure for General Motors was 23.6 million dollars.

Q. Do you have with you, Mr. Hall, a list of the institutions that owned Christiana Securities as of June 30, 1958?

A. Yes, sir, I do.

Q. Would you tell us what those institutions were?

A. I might add first that we do not generally make it a policy of identifying colleges with particular holdings. However, I will provide the information if you feel it necessary.

Q. Do you have the names of the institutions that go to make up the ten colleges as of June 30, 1958, that owned Christiana Securities?

A. Yes, sir, I do, but——

Q. Could you tell us the names of those institutions? It will not be necessary to indicate the value of their holdings.

A. You just want the names of the colleges?

Q. The names of those institutions, yes.

A. This information comes from my work papers rather than from the completed study itself.

You are interested in Christiana, are you?

Q. Christiana Securities—the education institutions that reported to you holdings of Christiana Securities as of June 30, 1958.

A. The colleges that reported to us as owning Christiana [fol. 402] Securities at June 30, 1958 were Cornell, Chicago, Union Theological Seminary, Massachusetts Institute of Technology, University of Pennsylvania, Bowdoin College, Johns Hopkins University, Harvard University, Wabash College and Williams College.

Q. And those institutions that you have named owned a total of 20.4 million dollars of Christiana Securities at June 30, 1958?

A. That is correct.

Q. While you have your work papers, would you give us the names of the institutions that owned du Pont stock as of June 30, 1958?

A. The colleges that owned du Pont at June 30, 1958, were Amherst, Northwestern, Smith, Georgetown, Ohio State, Tufts, Rochester Institute of Technology, Princeton, Pennsylvania, Yale, Hamilton, Carnegie Institute of Technology, Swarthmore, Wesleyan, Minnesota, Catholic University of America, Michigan, Cincinnati, Williams, Middlebury, Buffalo, Rochester, Boston University, Wabash University and Barnard.

Q. Those institutions owned a total of some 20 million?

A. Yes, 20.2 million.

Q. In du Pont stock?

A. Right.

Q. Then would you refer to your work papers and tell us the institutions that owned General Motors stock as of June 30, 1958?

Mr. Nitschke: Could the witness read those a little more slowly, please?

The Witness: Yes. On du Pont or General Motors?

By Mr. Gribbon:

Q. Read General Motors again.

Mr. Bushby: He hasn't read that, yet.

[fol. 403] By Mr. Gribbon:

Q. Read du Pont again.

A. General Motors Corporation at June 30, 1958, was Radcliffe College, Amherst College, Rutgers University, Smith College, Union Theological Seminary, Massachusetts Institute of Technology, Tufts University, Pomona College, Bowdoin College, Yale University, Carnegie Institute of Technology, DePauw University, University of Michigan, Wabash College, Middlebury College, University of Pittsburgh, Dartmouth College, Boston University, Barnard, Lehigh, and Trinity.

Q. Mr. Hall, you are not connected with any of these educational institutions?

A. No, sir, I am not.

Q. You have no responsibility in any way for their investment policies, do you?

A. None whatsoever.

Q. Do you have any investment responsibilities with the Boston Fund?

A. No, sir, I have nothing to do with the formulation of their investment policy.

Q. You merely keep these records?

A. Yes, sir. I compile the study, or we compile the study, I should say.

Mr. Gribbon: Thank you.

Mr. Andrews: I have a question, your Honor.

The Court: Very well. Proceed.

Redirect Examination:—(Continued)

By Mr. Andrews:

Q. Mr. Hall, I think you were asked on cross examination to compare some of the holdings of some of the GM stock held by these various colleges for the year 1957 as compared to 1958, and there was noted a decrease in these holdings.

I would ask you first, do you know of the reason why [fol. 404] there would be a decrease in the holdings of this stock?

A. No, sir, I could not provide you with a reason for that.

Q. You do not know whether it was due perhaps to a decrease or a decline in market price of stock in mid-1958—of this stock in 1958?

A. No, sir, I would not want to venture an opinion on that.

Mr. Andrews: That is all.

I again renew my offer.

The Court: Are there any other questions?

The exhibits are admitted in evidence.

(Said documents, so offered and received in evidence, were marked Government's Exhibits Nos. 70 and 71.)

The Court: You are excused.

(Witness excused.)

Mr. Metzger: The Government calls Mr. George Johnson.

George E. Johnson, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Metger:

Q. Mr. Johnson, will you state your name and address, please?

A. My name is George E. Johnson; I reside at 7016 Lenhart, Chevy Chase, Maryland.

Q. Sir, could you tell us what education you have had to qualify you as a witness in this case?

A. I received both my A.B. and LL.B. magna cum laude from the University of Nebraska, finishing in 1929.

Q. Could you give us a brief outline of your experience since that time, sir, business experience?

A. Business experience from 1929 to 1935, I was asso-
[fol. 405] ciated with the law firm—it has changed its name, but most of the time it was Root, Clark, Buckner, Howland, and Ballantine in New York City.

From 1935 to 1955, I was an officer of the Teachers Insurance and Annuity Association in New York City, starting as secretary, and finishing as vice-president and general counsel.

Q. Sir, will you tell us what the Teachers Insurance and Annuity Association is?

A. The Teachers Insurance and Annuity Association is a legal reserve life insurance company that sells contracts of conventional type; that is, fixed dollar insurance and annuity policies, and concentrates primarily in the college field.

Q. Will you continue, please?

A. From 1938 to 1955, I was secretary of the trustees of TIAA stock, which is a special membership corporation that holds the stock of the Teachers Insurance and Annuity Association.

From 1952 to 1955, I was vice-president and general counsel of the College Retirement Equities Fund. These three corporations are all affiliated as part of one system.

From 1955, about the summer of 1955, until April of 1956, I was president and chairman of the board of the Variable Annuity Life Insurance Company.

From July, 1956 until the first of this year, I was president of the Equity Annuity Life Insurance Company, and since then I have been chairman of the board of directors of that company.

Both of these latter two companies are life insurance companies in Washington, D. C., concentrating on the sale of variable annuities.

Q. Sir, would you relate to us your professional affilia-
[fol. 406] tions, societies, membership in groups of that type?

A. I am a Fellow in the Gerontological Society; a Fellow in the Life Office Management Association; a chartered life underwriter; a member of the Association of Life Insurance Counsel; a member of the American Bar Association; member of the Association of Teachers of Insurance; member of the University Association.

I think that covers most of them.

Q. That list is not exhaustive, is it, sir?

A. No.

The Court: May I have counsel's indulgence for just a moment?

(A recess taken.)

The Court: Proceed, please.

By Mr. Metzger:

Q. I believe we had just completed the Fellowships and Societies to which the witness belongs.

Sir, have you any publications or made speeches before professional groups over the past, say, five years?

A. Too numerous to mention—many, yes, of both.

Q. To what areas were these speeches and publications primarily addressed?

A. Well, groups interested in the science of gerontology, to pension groups. I would say most of them related to the pension field in a broad way, and at least half of them related to the subject of variable life annuities.

Q. An earlier witness, Dr. O'Leary, testified as to the limitation upon the amount of the assets of life insurance companies presently invested in common stocks.

Do you have any idea what that limitation is, generally, in the field today?

A. Yes.

Q. Could you tell us?

A. Well, today, contrasting this country with the King-[fol. 407] dom, for example, in the United Kingdom better than 20 per cent of the assets of life insurance companies are invested in stocks, whereas in this country the percentage is less than four per cent.

The reason is partly historical, partly legal, and partly the very nature of the life insurance development.

Do you want me to go into this a little?

Q. I would appreciate it, sir.

A. The first life insurance commissioner in this country was a man by the name of Elisha Wright, who was referred to as the "father of life insurance" in this country. He had very definite ideas as to how insurance should be developed.

These included the writing of life insurance to the legal reserve principle, the level premium principle; the concept that the reserves ought to be converted into cash values, which a man could come in and get at any time; and that there should be relatively small surpluses held.

Mr. Cox: May it please the Court, could we have a date for Mr. Wright?

By the Witness:

A. (Continuing) Mr. Wright was just prior to the Civil War in the 1850's.

Moving along historically, then, to say, starting after the Civil War up to the latter part of the 19th Century, insurance went off on a different tangent in this country. There was a rise of assessment companies and fraternals. That is, the fraternal societies put in insurance features to go along with them.

These did not involve reserves. By the end of the 19th Century, the fraternals and assessments were in trouble actuarially, and they had not made a proper allowance [fol. 408] for the increased cost as people grow older, the increased cost of insurance as people grow older.

Meanwhile, some of the companies that had put large surpluses in were guilty of abuses in the handling and regulation of those surpluses, particularly in stocks.

This all came to a focus in 1906 in the Armstrong investigation in New York, where the recommendation of the committee was that they go back to the principles of Elisha Wright.

Since then, from, say 1906 to 1929, life insurance companies in New York could not buy any common stocks.

In 1929, the law was amended to permit investments in preferred stocks only. In 1951, the New York law was amended to permit the investment up to 3 per cent of the company's assets in common stocks or 25 per cent of surplus, whichever was smaller; and again, that was

amended in 1957 to permit an investment up to 5 per cent of assets or 50 per cent of surplus.

The reason that the New York law is important is that New York applies the extraterritorial concept that any company doing business in the State must meet its requirements. Of course, since it is a key State, it has dominated the field.

In other States, however, where the laws permitted wide use of common stocks, life insurance companies not licensed in New York, nevertheless, have only a small amount of their assets in common stocks because under the legal reserve concept, you have to have a liquid portfolio in order to grant cash values, and if you have a small surplus, that is, the average surplus in this country is just under 6 per cent, that is the surplus is under 6 per cent of the total assets of the company, it is obvious that [fol. 409] even a small change in the value of common stocks which changes the value of your assets could exert leverage on the surplus.

To illustrate that, if a company had 100 million dollars of assets and 5 million dollars of surplus and had, say, 25 per cent of its assets in common stocks, a drop of even 20 per cent would make the company insolvent, even though it had much more than enough assets to meet its liabilities.

As a consequence, you find that the general average, say, at the end of 1957, in this country shaped up this way: there was 101 billion dollars of assets of American life companies and about 3⅓ billion dollars of surplus.

Q. Sir, without breaking the legal reserve concept, has any way been found to avoid this limited surplus problem?

A. Yes. We were struggling with that problem back in 1950, 1951, at the Teachers Insurance and Annuity Association. You see, we were serving the colleges, and even in those days the colleges had a very large proportion of their endowed funds invested in equities, principally in common stocks.

When it came to the pension benefits, however, they were turning the money over to Teachers Insurance and Annuity Association, which was investing them almost exclusively in debt type obligations, such as bonds and mortgages.

This is probably the genesis of the variable annuity idea. I was up at Cornell University in late 1950, and the treasurer pointed out to me that they had had people retired

from 15 to 20 years who thought that they had enough to live [fol. 410] on, and the university thought they had enough to live on, but as a result of inflation, the purchasing power of the dollar had been reduced to the point where the university was considering supplementing their annuities.

What was bothering the university was this: It was investing its funds on a balanced fund principle, and Teachers were investing all their funds in debt, and our investment performance was not nearly as good as Cornell's.

Now, this is highly significant in the pension field because you cover long periods of time, and a difference of one per cent in the rate, regardless of the amount paid in, a difference of one per cent, an increase of one per cent in your field, will increase your total benefit about 25 per cent through the average lifetime of a pension arrangement.

So the treasurer was exerting a good deal of pressure on me, and we realized something had to be done. We didn't act, however, until a year later, when Harvard University withdrew from our system in order to sell funds themselves, up to the point of buying the annuity when the person retires.

At that point we developed a new corporation, the College Retirement Equities Fund, created by special act of the legislature, which started business July 1, 1952.

Now, this company was the first of the variable annuities——

Q. Will you explain that term, sir?

A. A variable annuity is a company where your investments are to a considerable extent in common stocks, and instead of guaranteeing a fixed return, you guarantee that [fol. 411] the benefit will be based on the net investment return, a melding together of both the yield and capital gain or loss.

So that if stock prices go up, the annuity goes up, and if stocks prices go down, the annuity goes down.

The concept was as simple as this, and this is fundamental. You don't know whether prices in general are going up or down, but if they go up, the variable annuity will throw off more dollars; and if they go down, the fixed

dollar benefit will buy more. The two hedge or balance each other off.

The College Retirement Equity Fund at the end of 1958 had over 70 million dollars of assets. It has been a highly successful organization, all invested in common stocks.

Q. What are the assets of TIAA, sir?

A. The assets of TIAA today are in excess of a half million dollars.

Q. And what percentage of the assets of TIAA at that time, at the time of the inception of CREF were invested in equities?

A. Less than one per cent. Taking the TIAA, CREF system together as a system, they are now a little better than ten per cent invested in common stocks.

Q. Are there many variable annuities presently in existence, sir?

A. No. There are three small companies now functioning, two in Washington, one in Arkansas.

Q. Could you assign any reason for this limitation upon the concept?

A. Yes; for a year or two people were watching the Teacher's experiment, as it was considered. Then when, along about 1955, of those three companies I organized two of them. In those companies we had a jurisdictional question raised very early whether they should be organized under the regulation of the insurance department or under the regulation of the Securities Exchange Commission, or under both.

[fol. 412] A case was started, brought with the SEC against these companies. That case has gone through. It has been decided in the District Court and the Circuit Court of Appeals, both deciding that they should be regulated exclusively by the insurance departments.

The case has been argued before the United States Supreme Court and the decision should be down shortly. Pending that settlement of this legal issue, there has been very slow development in that area.

Now, there has been a great deal of interest all throughout the life insurance field and legislation is now being sought by a number of companies.

Q. Are you aware of your own knowledge that legislation has been introduced in the Legislature of various jurisdictions?

A. Yes, I am aware. I helped draft most of it and have appeared in the legislative hearings in which it has been discussed.

Q. All right. You say, sir, you helped draft most of it; without going into any names, could we state that interested parties included some of the larger insurance companies in the country?

A. Yes. I would say that legislation is now being sought by four of the ten largest life companies in the United States.

Q. Sir, what effect will the Supreme Court decision have upon activities of these and other insurance companies in the variable annuity concept?

Mr. Tierney: Which way? It depends on how they decide it, doesn't it?

The Witness: Could I have the question again, sir?

(Question read.)

[fol. 413] By the Witness:

A. It is clear that as soon as the jurisdictional question is settled, regardless of which way it is settled, there will be a rapid expansion in the variable annuity field. If the present decision is affirmed, the expansion will be more rapid than if it was reversed.

By Mr. Metzger:

Q. Sir, is there anything analogous to the variable annuity concept being developed in other institutional fields of investment?

A. Well, the variable annuity idea itself has been carried over and is developing quite rapidly in the trust field, trustee plans, as distinguished from the insurance plans where there was no jurisdiction problem involved.

Q. What of the mutual fund?

A. The largest mutual fund group is the Investors Diversified Securities at Minneapolis. They have formed a life insurance company, the Onna Life Insurance Company, and have amended the charter so that they can sell variable life annuities.

I have been consulted by three among the ten largest mutual funds, all of whom are laying plans to develop life insurance companies to sell variable life annuities.

Q. What effect, sir, do you believe that this will have upon the commitment of life insurance companies in equities in the immediately discernible future?

Mr. Cox: To what does this refer?

Mr. Metzger: It refers, sir, to practically a summation of the entire testimony regarding the insurance companies and the interest evinced by the mutual funds in the concept period.

Mr. Cox: All right.

[fol. 414] The Witness: May I have the question?

(Question read.)

By the Witness:

A. I would like to answer that this way. As a sociologist, there is a very rapid growing and expanding need for a life income by older people. Our population above age 65 is increasing today at twice the rate of our population generally. The number of people over 65 has increased from about three million in 1900 to nearly 15 million today.

These people need a life income. The life annuity, whether furnished by the Government through Social Security, or privately through a pension trust, or through a life insurance company is the answer to that problem.

So, as I say, there is an expanding need for it.

In the private field there is a very great need to store up more equities, more common stocks, than there has been in the past. I think this background of need is important to get the picture here spelled out here.

For example, there is about 35 billion dollars today in the Social Security, in the Civil Service and in the Railroad Retirement Board plans, all in effect funded in debt. There is about 15 billion dollars in the reserves of the life insurance companies under insured plans of which 96 per cent is funded in other than equities, mostly in debts.

There is about 20 billion dollars today in the reserves of the trusteed plans of which, depending on whether you figure market or books, from 25 to 30 per cent is in common stocks, and the balance is mostly in debts.

In the state and municipal plans there is around 13 billion

dollars in the reserves and a very large proportion of that [fol. 415] is in debts. So at present there is a great imbalance between debts and equities in the funding. Now, there are only two ways you can store up during your productive years the wherewithal to provide this life income that is needed. You either store in debt or you store in equities, ownership.

It is this growing concept that we need to look more and more to equities for that has been the stimulus behind this development. For example, the yield on common stocks over the last 20 years has exceeded the yield on debts by a considerable margin, almost 50 per cent in yield alone in addition to the appreciation.

Q. Have you made personal studies of that factor?

A. Many of them. We ran studies back—the best overall studies are the studies of the Collas Commission, which went back to about right after the Civil War, and ran them up to 1938, when they were discontinued. They showed an overall yield on the average, on the stock market, of just over seven per cent, taking both appreciation and the yield into account, as you would in this kind of program.

Those studies, right up-to-date, would run, the average, up to about 7½ per cent, which would almost double the benefit over the typical insurance company rate of 2½ per cent; so that the pressure here—the pressure is there to expand.

Q. What portion of life insurance companies' reserves are presently allocated to annuity reserves?

A. I would rather confine this to the insured plans, because I don't have as good overall figures on the individual annuities, and it is a relatively small part of the total; but on the insured plans, there is about fourteen billion out of [fol. 416] —about 14 or 15 billion out of 84 or 85 billion in reserves, or let us say 17 per cent.

Q. Has there been any change in that pattern over the past few years?

A. Yes, I would say over the last six years it has moved from about 11 per cent up to, say, 17 per cent, which has been responsive to this increasing demand or need for pensions.

Q. Has there been any change in the relation between the proportion of pension funds which are trusteed in proportion to those which are insured?

A. Yes. You can go back about six years, roughly, and there was six billion plus in the reserves of both the trusteed and the insured plans.

In the insured plans today, that is up between 14 and 15 billion, and it is up between 19 and 20 billion for trusteed plans.

Q. Would you say, then, sir, that the trusteed plans have moved ahead in total business of the insured plans?

A. Yes, the figures show that.

Q. At the same time, sir, what were the assets of TIAA in common equity stocks at that time; and what are the assets of that company and its subsidiaries today?

A. Prior to 1951, you couldn't buy any common stocks in New York, so TIAA had no common stocks. The assets of TIAA today are still almost negligible in common stocks; but taking TIAA and CREF as a system——

Q. Can you make a valid statement that it is a system?

A. Yes, it is a system, because under the plan—the two companies are located together—a participant must put at least half of the premium in TIAA; he can't buy CREF separately. And in the system as a whole, the percentage [fol. 417] today, on the common stocks, amounts to a little better than ten per cent of the total investments of the two companies.

Q. What proportion of current increase in the assets of the TIAA-CREF system are being placed in equities?

A. I couldn't answer that question precisely.

Q. Could you answer it within a range, sir?

A. No, I couldn't.

Q. As of the last time on which you have any data, the last date on which you have any data?

A. There is a constant shifting of the ratio of the older people in the TIAA system, and many of them did not go over into the CREF plan. The people who have become eligible in the last couple of years, 90 per cent of them are going into the CREF plan, and most of them are going in on a 50-50 basis; but the overall figures, I couldn't give you an answer on.

Q. You would anticipate this ten per cent in common stock for the TIAA-CREF system would increase proportionately over the next period of years?

A. The trend is that way, and you would expect it to, yes.

Q. Now, sir, on the basis of what you have just said as to population, annuity programs, need for a balanced retirement plan, in the experience of the TIAA, would you care, sir, to make any statement as to the trends of the investments in common stocks of insurance companies?

A. Trendwise, there is clearly a trend toward a greater and greater emphasis on pensions than there has been in the past. If you accept a hypothesis, that is, if you accept the hypothesis that companies are going into the variable annuity field as vigorously as I think they are, there will be a very definite trend increasing the proportion of common stock relative to bond and mortgage holdings.

[fol. 418] Q. Sir, what are the reserves of insurance companies today? I believe you mentioned the figure before.

A. The reserves at the end of 1957 were 84 billion. The assets were 101 billion.

Q. Has that asset or reserve pattern, whichever you choose, shown any discernible pattern in its growth over the years?

A. I don't have the figures for the reserves.

On the asset side, if you go back—well, it has just about doubled every ten years. Ten years ago it was 52 billion; ten years before that, it was 26 billion; and ten years before that, it was about 14 billion. It was in that general neighborhood.

Don't hold me to these figures. Roughly, it has doubled every ten years.

Q. Then by 1967, the figures should approximate, if the trend would continue, about 200 billion?

A. If the trend continued.

Q. Do you see any reason why it should not? Are you aware of any factors which would influence it negatively?

A. No. And so far as we see factors, it would increase the proportion, rather than decrease the proportion.

"Proportion" is the wrong word. Or, yes, it would increase the proportion more than double, rather than to be less.

Q. And at the present rate of investment in common stocks, I believe you mentioned earlier that it was roughly 4 per cent?

A. A little under 4 per cent.

Q. Which would then be a figure of roughly 8 billion dollars, as against 200 billion asset figure?

A. Yes.

Q. On the basis of your knowledge or background and your belief in the expectations of the variable annuity con-
[fol. 419] cept with relation to the companies now interested, would you say that that proportion of 200 to 8 will come forward or be increased in one or the other proportion —backwards in proportion?

Mr. Cox: May we have that question read, please?

Mr. Metzger: I will do better than that; I will rephrase it.

Mr. Cox: I am indebted to you.

By Mr. Metzger:

Q. Mr. Johnson, do you anticipate, on the basis of your previous testimony—do you anticipate that the percentage participation of life insurance companies in equities will increase substantially over the next ten years?

A. Well, I have testified that there is a trend toward a greater emphasis on annuities; and also that through the variable annuities, there should be a trend toward a greater proportion of the annuities reserves going into equities. On the basis of these trends, the proportion should be increased.

Q. Would you care to make any estimates?

A. That would be fairly hypothetical. If you want an estimate, it has got to be just that.

It might double; that is, instead of 4 per cent be 8 per cent, or amount to 16 billion dollars in the hypothesis that you laid out.

Q. Or higher?

A. Or higher; but it is a pretty "iffy" question, and a pretty "iffy" answer.

Q. Thank you.

Is the variable annuity concept limited to insurance companies? Is it being used in, for example, pension plans?

[fol. 420] A. Yes. I know of some 30 plans, including many large employers, like the Tennessee Valley Authority. I have been on a committee there. And there it the Chemstrand Company, Long Island Lighting Company, General Mills; there is Warner Lambert Pharmaceutical Company—quite

a few major companies have adopted the variable annuity in the pension trust field.

Q. Do you anticipate any increased rate of growth in these trusteed plans?

A. Oh, yes. The trend—there again the trend is very definitely to use the variable annuity more and more, although it is nearly as important or significant in the trusteed field, because under a trust the trustee can invest in common stocks now. The only significance in the trusteed plan or the variable annuity is where the liabilities are tied to the investment experience, there is a tendency for the company to go a little heavier in the equity field or the trusteed field.

Q. Aside from the variable annuity concept, you have testified that you were an adviser on the Tennessee Valley Authority plan, I believe?

A. Well, perhaps I should explain that. I am on the special investment committee there as an investment adviser, but unofficially helped a good deal with the establishment of their variable annuity plan.

Q. Then may I change my question, sir, and ask you, do you anticipate that the trusteed pension plans will increase —their rate of growth and their rate of participation in equities?

A. Yes. Historically, say, over the last six years, the proportion of common stocks in the trusteed plans has increased, has doubled from about 12 per cent to 25 per cent of the total; and the reserves have tripled from, roughly, six and one-half billion dollars to 19 and one-half billion dol-[fol. 421] lars. Those are approximate figures. So that that is a rather dramatic rate of growth for both items.

And that trend is almost sure to continue.

Q. I believe, sir, we have spoken about or just about every type of retirement plan, with the exception of the state and municipal pension plans, which I believe you testified earlier have about 13 billion dollars in assets at the present time, which is primarily in debt?

A. That is true. The annual contribution to those plans is in the neighborhood of two billion dollars. I don't have the exact figures.

Most of their reserves are funded in debt. Now one of those, the Wisconsin State Employees Plan and the Wisconsin State Teachers Plan—there are two separate ones—

made the variable annuity available to their participants at January 1st of 1958; and that, of course, has stirred up a great deal of interest.

I had correspondence with the directors of three states where they are considering following the Wisconsin pattern.

Q. Based upon this testimony sir, would you care to indicate any trends as to the participation of the State Mutual Pension Plans, in common stocks?

A. I think it is clear that there is a trend in that direction.

Q. And a trend in that direction for funds which presently have 13 billion dollars in assets, and which are growing at the rate of two billion dollars a year?

A. Right. I shouldn't say, "growing at the rate of two billion." That is an estimate. I don't have a breakdown as to the rate of growth.

[fol. 422] Q. Would you say, sir, that the experience that you—you might analogize there the experience to be anticipated by these groups presently developing such plans to the experience of CREF.

A. Yes. I think that any fund that makes a decision to go into a variable annuity has exactly the same problem and situation that TIAA had in 1952, and that the subsequent development is likely to follow somewhat the same general pattern.

Mr. Metzger: Thank you, sir. I have no futher questions on direct.

Cross-examination.

By Mr. Cox

Q. Mr. Johnson, there was one point in your direct testimony that I was not quite clear about. Do you recall when Mr. Metzger was questioning you about litigation that had arisen as to whether the Securities and Exchange Commission or the insurance authorities of the various states shall have jurisdiction over the business of selling variable annuities?

A. Yes, sir.

Q. In that connection, you mentioned the problem of obtaining legislation in some of the states?

A. Yes, sir.

Q. That is, is that a different problem from the one that is involved in the litigation?

A. Yes. There are some states in the union today where a company can be formed to sell variable annuities, provided they confine themselves to that one product, and don't sell both fixed dollar and variable contracts in the same company. In other states, it would take special legislation in order to authorize the company to sell. Prudential Insurance Company is seeking such legislation in New Jersey, the Paul Revere Life Insurance Company and the State Mutual Life [fol. 423] Insurance Company of Worcester are seeking such legislation in Massachusetts.

The John Hancock Life Insurance Company, supported by the New England Mutual Life Insurance Company, is seeking to get some legislation in Massachusetts so that they can sell a group annuity contract, where they could separate an account and put altogether common stocks in it and get around this straight jacket the life companies are in under the existing laws.

The Equitable Life Assurance Society of New York is seeking legislation this year to get trust powers which would permit them to do the same thing as John Hancock.

There is a bill pending in Connecticut, which would permit any life insurance company, any domestic life insurance company in Connecticut, to set up a separate account and sell variable annuities right along with the regular annuities which they sell.

Q. Would it be fair, Mr. Johnson, to say, without attempting to predict what the results of these various legislative efforts will be, that the degree of expansion in the business of selling variable annuities may be influenced to some extent by what happens to these legislative efforts?

A. Yes, no question.

Q. In your testimony, Mr. Johnson, you spoke in a number of contexts about the trend in the investment policies or practices of pension institution funds or operations of various kinds toward investment in common stocks, trends in the future, which I think you quite aptly said was an "iffy" and somewhat hypothetical problem.

Am I misquoting you on that?

A. I think that the trend, if you confine yourself to the pension trust field as distinguished from the life insurance

[fol. 424] field, the trend seems to be rather definite. To just recap that in about two sentences, the assets, that is, the reserves have tripled in six years, and during that period the proportion of common stocks has moved from 12 per cent to 25 per cent on book values. That is a very definite trend.

The other question, I think, involves some other things that I said.

Q. Whether you can predict——

A. The question which I said was rather "iffy" is in the life insurance field, if you are going to predict where you are going to be in ten years, how these trends will work out. If you are going to come up with a dollar figure, it is a little indefinite.

Q. That is what you regard as a little conjectural?

A. Yes, sir. But I think that the trend in the pension trust field is a fairly definite, relatively firm trend, thinking of it as a trend.

Q. Let me ask you this question, then, Mr. Johnson: Can you be quite sure with respect to a time in the future as to the degree to which the trend may continue, or is that again to some degree a matter of hypothesis and conjecture?

A. Certainly you cannot be quite sure, dealing with trends such as this.

Q. In your judgment, would these trends of which you spoke be at all influenced by general economic conditions?

A. Yes, the trend would be influenced by general economic conditions. However, the powerful upthrust of the need for more annuities, the increasing population, and so forth, would override to a considerable extent the economic thing in the long term. But certainly if you were charting a trend, the dips and so forth would be affected very much by current economic conditions.

[fol. 425] Q. The trend to investments in equities might be influenced by whether the economy at a particular time was in a deflationary or inflationary stage, is that correct?

A. That is an absolutely true statement as the question was asked, yes, sir.

Q. Mr. Johnson, I take it all of these institutions which you have testified about are related, I believe, to pensions in one way or another, is that right, or to annuities? They

are either institutions which are set up to provide pensions or annuities or they sell annuities or they sell life insurance?

A. Well, I will put it this way. In the private field, as distinguished from Government, an annuity can only be sold to a pension trust group or through a life insurance company.

Q. Perhaps you could help me by just listing for me the kinds of institutions you covered in your direct testimony.

A. Let me separate the pattern this way, by just a listing of reserves to start out with, and that may help.

There are today about $35 billion of reserves in the Public Federal Systems, that is, in Social Security, Civil Service, and the Railroad Retirement Board. I have grouped those together without breaking it down.

Q. It is the private institutions I was asking.

A. There are, roughly, two groups of private institutions. The pension, that is, the trustee plans which are largely trusteed through banks. As I indicated, they have about $30 billion in current reserves.

Then there is what we call the insured plans. Now these are employer-employee arrangements, funded through a life insurance company. There is about 15 billion in those.

I did not deal with a relatively small segment of the individual life annuities. The reserves of these in life insur- [fol. 426] ance companies today is about a little over 3½ billion dollars, which is relatively small in the picture.

Q. I had a note on your direct examination that there was testimony about the trustee plans you have mentioned, about the insured plans, and then about the investment policies of mutual funds. Is that correct?

A. Really, the only reference to mutual funds which I made in my testimony was the fact that one of them, the Investor Diversified Securities, now owns a life insurance company with authority to write variable life annuities; and other mutual funds are planning to form life insurance companies for the purpose of writing variable life annuities so their salesmen can have both mutual fund certificates and variable life annuity policies in their kit.

Q. Then let me ask you this question, which is what I was trying to lead up to, Mr. Johnson. Do you know whether all of these institutions that do now or may in the

future engage in one way or another in the business of writing or selling variable annuity plans follow a policy of diversification when they invest in common stock?

A. It is today a concept of institutional investment that there should be diversification both among securities, between stocks and bonds. We have stocks among different companies, and if possible, a diversification over time in the investing of them so as to reduce the random chance factor as much as you can.

Q. Does that policy involve a diversification among different kinds of industries, so far as common stocks are concerned?

A. Yes. The typical investment policy of an institutional investor of the type that I am talking about would involve a diversification between industries and between companies within the industry.

[fol. 427] Q. You would get a diversification as between industries and as between companies in the industry?

A. Right.

Q. Would you expect that practice and policy to continue along with the trends that you have described in your direct testimony?

A. I would expect it to, yes, sir.

Q. I take it, Mr. Johnson, that you are not in a position to testify that any of the institutions that you have discussed in your direct testimony in the future will buy any particular amount of stock of any particular company at any particular price, is that right?

A. No, I am not. I am testifying in the broad picture, and not as specific as that, sir.

Mr. Cox: Do you have some redirect?

Mr. Metzger: Yes, I have two questions.

Redirect examination.

By Mr. Metzger:

Q. Mr. Johnson, on cross-examination, Mr. Cox brought out some questions as to your statements on the hypothetical aspects of the life insurance trend.

To clarify that, was your statement as to the "iffyness" or hypotheticalness of the statement addressed to the specific figures or to the existence of the trend?

A. I feel very confident as to the trends. It was the difficulty, when you are superimposing one trend on another, to pull a figure out of the air, that makes it difficult to come up with a figure.

Q. One further question, sir. You have been, I believe, qualified as an expert in the pension retirement field. Have you ever had any expert training or experience in the investment field?

A. I do not appear here as an investment expert, sir.

Mr. Metzger: Thank you.

[fol. 428] MOTION TO STRIKE JOHNSON'S TESTIMONY AND DENIAL THEREOF

Mr. Cox: May it please the Court, I have been interested, in fact, fascinated, by Mr. Johnson's testimony. He is, by the way, an old friend of mine. We went to the University of Nebraska together. But interesting as the subject is, it has so little to do with this case, Mr. Metzger having had a full opportunity to connect it, that I now make a motion that his testimony be stricken in its entirety, because it is quite irrelevant, immaterial, and has no probative value whatsoever.

Mr. Bushby: I support the same motion.

Mr. Tierney: I concur.

The Court: Overruled.

Court stands recessed for ten minutes.

(A short recess was taken.)

The Court: Proceed, gentlemen.

Mr. Bushby: If the Court please, before we resume I have been delegated to make a request or suggestion on behalf of the counsel and some of the witnesses whether we could adjourn at four o'clock this afternoon. Many have to take trains and planes. It would be a convenience.

The Court: The Court would be glad to accommodate counsel.

Mr. Owens: The Government calls Ralph Sheets as its next witness.

RALPH C. SHEETS, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

[fol. 429] Direct examination.

By Mr. Owens:

Q. Would you state your full name and address, sir?
A. Ralph C. Sheets, 15 Wall Street.
Q. What is your business connection, sir?
A. An officer of Blyth & Co.

The Court: Would you keep your voice up, please?

By Mr. Owens:

Q. What is the business of Blyth & Company?
A. Investment banking.
Q. And what is your position with that organization?
A. I am a vice president in charge of national sales.
Q. And what are your responsibilities being in charge of the national sales?
A. The distribution of corporate securities through our own organization, our own retail group.
Q. That is, securities which your firm is a participant in the underwriting of?
A. That is correct.
Q. So that as between the two functions of buying securities and reselling them, you are in the selling end of the business of investment banking, is that correct?
A. That is correct.
Q. Are you acquainted, Mr. Sheets, with the financing of Ford Motor Company stock in the amount of 10,200,000 shares?
A. Yes.
Q. Was Blyth Company a member of the syndicate that undertook the underwriting of that financing?
A. They were.
Q. What was the position of Blyth & Company?
A. Blyth & Company was the manager of—one of seven managers, and ran the books in the deal.
[fol. 430] Q. Would you tell us what you mean when you say that they had a responsibility for running the books?

A. That would involve the syndication of the issue, the distribution of the underwriting among the underwriting members, the selling group, and group sales for the account of all the underwriters.

Q. Would you have the responsibility for maintaining the subscription book?

A. Yes, we would.

Q. And would you have the responsibility for coordinating the subscriptions against allotments of stock against those subscriptions?

A. Yes, we would.

Q. And you would handle, would you not, in the capacity of running the books, large amounts of accounting and clerical responsibility in connection with the financing?

A. Yes, we would.

Q. What was the total amount of the financing by the Ford Foundation?

A. 10,200,000 shares.

Q. The dollar amount, sir?

A. On the price to the public it was $657,900,000.

Q. And what was the date on which that financing was offered to the public, sir?

A. January 17th the prospectus was effective and the public offering was made on the 18th.

Mr. Bushby: The year, please.

The Witness: 1956.

By Mr. Owens:

Q. Do you know, Mr. Sheets, what percentage of the total equity in the Ford Motor Company that single financing represented?

A. It should be in the record. My recollection is it is in the neighborhood of 20 per cent.

[fol 431] Q. At the time of that financing, Mr. Sheets, do you recall that there was a recapitalization of the structure of the Ford Motor Company?

A. Yes, there was.

Q. And do you recall that as a consequence of that recapitalization there was a total capital stock outstanding of 53,461,470 shares?

A. Yes, that is the correct figure.

Q. And the amount of stock to be sold was 10,200,000?
A. That is correct?

Q. So that it would indicate that the percentage of the total equity in the Ford Motor Company that was being financed was in the neighborhood of—well, very close to 20 per cent?

A. That is correct.

Q. Do you recall the date on which the Blyth Company was selected to head the group of underwriters?

A. I believe that date was early in November, and it might have been around the 9th of November, 1955.

Q. Now, do you know how many underwriters there were in the syndicate that was formed?

A. Well, there were 722.

Q. Now, the underwriters, I take it, are ones who bear the risk that the market price of the security may decline before they are able to resell it to the public?

A. That is correct.

Q. That is the risk the underwriter assumes, is that correct?

A. They assume that risk, correct.

Q. And the total dollar amount of the public offering was $657,500,000.00; that amount was distributed among the 722 underwriters in varying proportions, is that correct?

A. That is correct.

Q. Now, would you explain to us what the formation [fol. 432] was of the selling group that participated in the retailing of the securities or reselling of them to the public?

A. Explain the formation of the selling group?

Q. Yes, that is, how many were in it, and so forth.

A. There were something over a thousand selling group members in the domestic group. Let's see if I have that.

Q. Well, I think that estimate will be close enough. That figure of the domestic selling group of 1,158, does it refresh your recollection that that was the case?

A. I think that is the figure in the domestic selling group, of which a portion of those, about 100 of those names were also underwriters.

Q. From 100 to 103 were also underwriters?

A. Underwriters, that is correct.

Q. So that in addition to the 722 underwriters who were

engaged in the reselling of this, there were additional members of the selling group, domestic members of the selling group, of something in excess of 1,000?

A. That is correct.

Q. I believe that there were also a number of selling groups organized in Canada, is that correct?

A. Selling group members in Canada and abroad.

Q. Do you recall what the numbers were of those, Mr. Sheets?

A. I do not recall those numbers, but I should have them. There are 135 firms in Canada; 155 in foreign countries.

Q. Now, this financing, the amount of $657,900,000, this was equity financing of capital stock, was it not?

A. That is correct.

Q. Do you recall any financing prior to that date, equity [fol. 433] financing, that was greater in magnitude?

A. No, I think that was the largest equity offering that had been made.

Q. What do you recall as being the next closest dollar amount of equity financing compared to that 657 million or 658 million?

A. I think the next largest deal was the General Motors offering to shareholders, in dollar amount.

Q. Do you recall what the amount of that was, approximately?

A. I believe it was a little over 350 million dollars. I don't know the exact figure.

Q. I have it as 328,551,000.

A. It would be a matter of record.

Q. So that the financing of the Ford Motor Company stock was approximately double the largest previous equity offering?

A. That is correct.

Q. Now this was what is known as a secondary issue, was it not, Mr. Sheets?

A. The Ford Motor issue?

Q. Yes.

A. That is correct.

Q. That is to say, it did not represent new money to be given over to the Ford Motor Company, but that the proceeds were to go to the selling stockholder?

A. That is correct.

Q. Who was the selling stockholder, Mr. Sheets?

A. The Ford Foundation.

Q. And do you know what the percentage of the total equity in the Ford Motor Company the Ford Foundation had after the recapitalization?

Mr. Owens: The Government requests that this document entitled, "Prospectus 10,200,000 shares, Ford Motor Company, common stock, $5 par value" be marked for identification as Government's Exhibit 72.

[fol. 434] (Thereupon said document was marked Government Exhibit 72 for identification.)

Mr. Owens: And I would like to offer this document in evidence at the present time.

Mr. Cox: No objections.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 72.)

Mr. Owens: Looking on page 22 of that prospectus, Mr. Sheets, do you have a copy?

The Witness: Yes, I do. I was just trying to locate that. Yes, I find the table.

By Mr. Owens:

Q. At the bottom of the page, do you see the table headed, "As of December 1, 1955, without giving effect to the reclassification"?

A. Yes, I see that table.

Q. And do you see an entry there under the "Selling Stockholder"?

A. Yes, I do.

Q. What is the per cent of the total outstanding equity shown for the selling stockholder?

A. 88.4 per cent.

If you turn to Page 23, I think you will see the resulting percentage of total equity held by the selling stockholder or the Ford Foundation to be 67.6 per cent after the recapitalization and the offering of its securities.

A. That is correct.

Q. Now do you know, Mr. Sheets, whether or not there

was a commitment by the Ford Motor Company or, rather, [fol. 435] the Foundation that it would not in the future sell additional portions of its equity?

A. Was there a commitment that the Foundation would not sell any additional equity?

Q. Will you turn to Page 22?

A. On the contrary, they reserved the right to do so.

Q. They reserved the right to do so?

A. I think the prospectus will show that.

Q. I would like to read into the record a paragraph from Page 22 with reference to the prospectus statement concerning the Foundation's intention with respect to possible sale of further portions of its equity.

That reads, in the third or fourth paragraph on that page:

> "From time to time the Foundation may make gifts to scientific, educational or charitable organizations of shares of Class A stock or of shares of common stock resulting from the conversion of Class A stock. The Foundation may from time to time sell further portions of its holdings of the stock of the company and has agreed to sell certain shares to the company for a limited period in connection with the company's saving and stock investment program for salaried employees, as described under 'Employee Relations.'"

Now, in offering securities to the public, is it the purpose of the prospectus to acquaint the investing public with the material facts in connection with the issue?

A. That is correct.

Q. Do you know how widely the stock was held that was not held by the Foundation prior to this offering of securities, Mr. Sheets?

A. How widely it was held?

[fol. 436] Q. Yes. We have established, I think, that the selling stockholder or the Ford Foundation owned 88.4 per cent of the total equity.

A. The tabulation on Page 22 will show that the members of the Ford family and their interests owned 10.4 per cent; the directors, officers, and others owned 1.2 per cent; the balance was owned by the selling stockholder, the Ford Foundation.

Q. That, I take it, among industrial corporations of this size, is an extremely narrow or small group of outstanding stockholders?

A. That is true.

Mr. Owens: I would like to have the reporter mark for identification Government's Exhibit No. 73.

(Thereupon said document was marked Government Exhibit 73 for identification.)

Mr. Owens: This document is entitled, "Chronology, public offering of 10,200,000 shares of common stock, $5 par value, of the Ford Motor Company."

By Mr. Owens:

Q. Will you identify that document for us, Mr. Sheets? Does that come from the files of your Company?

A. That comes from the files of Blyth & Co.

Q. What does it reflect?

A. It reflects the various steps that are to be taken through the course of the preparation of the issue for market, and the marketing of the stock; and finally, the eventual listing of the stock on the Exchange, the various Exchanges.

Q. Now, did you say that among the other items that this shows is the application for a listing on the New York [fol. 437] Stock Exchange of the proposed issue of stock? Is that correct?

A. That is correct.

Q. So I take it then that prior to this financing of 657 million dollars, that the securities of which this is a secondary offering, were not previously listed on any of the national or regional stock exchanges in the United States or abroad?

A. They were not.

Q. Did the listing on the exchange become effective prior to the offering?

A. The listing wasn't effective but it was acknowledged that application would be made to list.

Q. But it had not actually been?

A. It had not became effective.

Mr. Owens: The Government offers Exhibit No. 73 for identification into evidence.

Mr. Cox: No objection.

Mr. Bushby: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 73.)

Mr. Owens: The Government asks that the exhibit entitled, "Agreement Among Underwriters" dated January 17, 1956 be marked for identification as Government Exhibit No. 74.

(Thereupon said document was marked Government Exhibit 74 for identification.)

Mr. Bushby: How much of that is there?

Mr. Owens: A five-page document containing solely the agreement among the underwriters.

The Government offers Government Exhibit 74 for identification into evidence.

[fol. 438] Mr. Cox: May it please the Court, I wonder if Mr. Owens would agree that we should have an opportunity to examine the voluminous annexes to this agreement so that we may at a later date, if we wish, ask to have the annexes admitted into evidence in the record of the same time the agreement itself is. They are all part of the document.

We got them last night for the first time. We haven't had a chance to look at them. We are not objecting to the exhibit. I wonder if we could have that understanding?

Mr. Owens: I think that is a useful suggestion.

The Court: It is received in evidence.

(Said document, so offered and received in evidence was marked Government Exhibit 74.)

Mr. Owens: I will ask the reporter to mark the annexes as Government Exhibit No. 75 for identification.

(Thereupon said documents were marked Government Exhibit No. 75 for identification.)

Mr. Owens: There is no objection to the admission of Exhibit No. 75?

Mr. Cox: No objection.

The Court: It is admitted.

(Said documents, so offered and received in evidence were marked Government Exhibit 75.)

By Mr. Owens:

Q. Would you turn, Mr. Sheets, to the second page of the Agreement Among Underwriters, the fifth paragraph [fol. 439] which is entitled, "Broad Distribution Agreement" in bold face type.

Would you tell us what your acquaintance is, sir, with the aspect of this agreement among the underwriters with respect to their obligation to effecting a broad distribution of the securities that they were underwriting?

A. I am not sure I quite understand that question, Mr. Owens.

Q. What was the instruction or the wish of the Foundation or the selling stockholder with respect to broad distribution?

A. Both the selling stockholder and the company were interested in a broad distribution of the shares to the public, and that was one of the requirements placed in this agreement among the underwriters to comply with the wishes of the seller and the company.

Q. That agreement provides as follows:

> "We agree to use our best efforts to assure a broad distribution to the public of our retained or released shares and to take all action which, in our opinion, is reasonable and practicable under the circumstances to assure that no single purchaser or group of related purchasers will acquire any substantial proportion of such shares. In this connection, we further agree that, if at the time the Registration Statement becomes effective, we have orders, which in our judgment represent bona fide and responsible orders for investment, for shares in excess of the number of shares retained by us for retail sale, we will, in allotting shares, make allotments initially to the extent of 100 shares and less on all such orders, and in no event make [fol. 440] allotments in excess of 200 shares unless we would thereby be prevented from promptly disposing of all such shares."

Is such a limitation upon the nature of the distribution in terms of breadth common in underwriting large amounts?

A. No, it is not a common requirement.

Q. So it is accurate to characterize this feature of the underwriting agreement as unique?

A. I would think so.

Q. Now, if you will turn to Government Exhibit No. 75, which is the annex to the agreement among underwriters, I think you will see that the first of those annexes on Page 1 is entitled, "Underwriting Agreement."

Would you state generally what that is?

A. That is an agreement between the underwriters and the selling shareholder.

Q. Does it contain the price at which the underwriters agree to pay the selling stockholder in the case of the secondary issue?

A. Yes, it would.

Q. And incorporates the other terms and obligations of the parties in connection with the underwriting, is that correct?

A. Could you restate that?

Q. I say, it incorporates the obligations of the parties with respect to the securities being underwritten?

A. That is correct.

Q. Now on Page 3 of that in Section 4 under the title, "Public Offering," you note there is in the second paragraph of Section 4 a similar obligation imposed on the underwriters, vis-a-vis the Ford Foundation, the selling stockholder?

A. That is correct.

[fol. 441] Q. I note at the last sentence of that second paragraph of Section 4 the following,

> "Each underwriter will refrain, and such agreement will require each dealer to refrain, from selling shares, with or without any discount from the public offering price, to any dealer in securities who is not a party to such an agreement."

Do I understand that correctly that this, in turn, would require the underwriters to obtain a similar commitment with respect to effecting as broad distribution as he under-

took directly as part of his underwriting with the selling stockholder?

A. That is correct.

Q. On pages 10 through 15 is listed the 722 participating underwriters and the respective shares that each was obligated to purchase, is that correct?

A. That is correct.

Q. If you will turn to the Annex further on, entitled, "Selling Agreement," that agreement was entered into between participating members in the selling group and the companies as representatives of the underwriters?

A. That is correct.

Q. Does that contain the obligation of the dealers who would be retailing the securities with respect to matters of broad distribution?

A. It does.

Q. I see this Section 3 there contains a paragraph, does it not, similar to that that I read into the record concerning the obligation of allocating shares?

A. It does.

Q. Where they had orders in excess of the amount that had been allocated to that particular dealer?

A. That is correct.

[fol. 442] Q. This meant, did it not, that they would use their best efforts to see that the security was not sold in blocks greater than 100 shares initially?

A. That is correct, and in no event to make allotments in excess of 200 shares unless he is prevented from disposing of his commitment.

Q. The last sentence of that section says,

> "You will not sell any shares to any dealer or broker in securities who is not subject to an agreement substantially to the same effect as this section."

A. That is correct.

Q. That indicates, does it not, that this imposed an obligation on the dealer who signed the selling agreement not to sell them to any other dealer unless he was similarly obligated to effect a broad distribution in the same fashion as this paragraph provides?

A. That is correct.

Q. Then the succeeding document is "Selling Agreement" marked "Canadian." That is the agreement incor-

porating the obligation with the dealers who would sell the securities in Canada?

A. It is the obligation with the Canadian dealers. I am not quite sure where they were permitted to sell the securities, but they are Canadian dealers.

Q. That has, has it not, a similar broad distribution agreement?

A. Yes, it does.

Q. And the next document, "Selling Agreement European" has a similar obligation with respect to effecting a broad distribution?

A. Yes, it does.

Q. Would you tell us, Mr. Sheets, what the effect on the cost and complication of making the offering to the public [fol. 443] and successfully retailing it that a broad distribution requirement of that character has?

Mr. Cox: I object to the question unless it is clear whether the question is addressed to the Ford issue or to all issues.

By Mr. Owens:

Q. (Continuing) To the Ford issue.

A. Will you restate the question?

Q. How does it complicate the offering to the public of imposing a broad distribution requirement, such as this, in terms of expense and difficulty and so on?

A. It increases the cost of distribution. The board distribution required increases the cost of the distribution.

Q. Without that requirement it would, I take it, have been possible to market the securities at a smaller spread?

A. I wouldn't want to say so.

Mr. Cox: May I have the question and the answer read?

(Record read.)

By Mr. Owens:

Q. The out-of-pocket expenses incurred by the underwriters and dealers in marketing securities are greater, are they not, when you have to effect a great deal larger number of transactions?

A. Yes, they are.

Q. Would you tell us whether or not there were certain studies or comparisons made with spreads of charge connected with issues of other large industrial stocks by Blyth & Company?

A. Yes, there were.

[fol. 444] Mr. Owens: I will ask the reporter to mark for identification as Government Exhibit 76, this two page document entitled, "Ford Motor Company, Selected Underwritten Industrial Common Stock Offerings for Cash," dated January 1, 1952, to January 11, 1956.

(Thereupon said document was marked Government Exhibit 76, for identification.)

The Court: The Court will now recess.

(Whereupon a recess was taken in the above-entitled cause until two o'clock of the same day.)

[fol. 445] Before Hon. Walter J. LaBuy, Friday, February 20, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to recess.

Present: Same as before.

The Clerk: Case on trial.

The Court: Proceed, gentlemen.

Mr. Owens: I would like to have the reporter mark for identification Government's Exhibit 77, a document entitled, "Ford Motor Company, Other Major Underwritten Industrial Common Stock Offerings for Cash, from January 1, 1954, to January 11, 1956."

(Thereupon said document was marked Government Exhibit 77 for identification.)

RALPH C. SHEETS, a witness called on behalf of the Government, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination:—(Continued)

By Mr. Owens:

Q. Mr. Sheets, do you recognize this document?

A. This is No. 76. I believe these are documents from our files showing selected industrial stock offerings for cash.

[fol. 446] Could you speak a little louder, sir, please?

A. I believe that these are documents from our files showing selected industrial stocks that were underwritten, offerings for cash, with a computation of the underwriting commission as a per cent of the offering price.

Mr. Bushby: Now, if your Honor please, I assume counsel intends to offer these Exhibits 76 and 77 into evidence and I wish to interpose the same objection that we did to proposed Exhibit 41 the day before yesterday, on which I believe your Honor agreed with us; here is another listing of issues.

The manager for the various issues is not on the stand—of course, if Blyth is the manager for any of the issues listed my objection to that particular item does not pertain, but if Blyth and Company is not, I think the procedure agreed upon yesterday or the day before yesterday, where your Honor said at page 297 of the transcript as to similar papers:

> "If there isn't a further explanation this could be very misleading to the Court looking at this record. It is not complete. So I think the better practice is this, you would save time by offering them as you are prepared to explain them so they will have some evidentiary value which they do not have now."

I think there is nothing in these two exhibits, 76 and 77, which adds to any explanation of the Ford offering at this time. It is simply a work sheet from which someone [fol. 447] got the idea of what he thought the spread ought to be; but all the figures do not bear on the Ford issue

and they are not proper in this case until the managers are here.

Mr. Owens: If your Honor please, these are the work papers from Blyth & Company in connection with their preparation to participate in the underwriting of the stock owned by the Ford Foundation.

In that connection they made a compilation of the spread or commission as a per cent of the offered prices for 30 or so odd major industrial securities during the immediately preceding year.

I think it bears on what the cost would be and the probable spread that may be required in connection with the underwriting of the securities under the proposal of the Government.

The Court: Well if they were issued by his company, yes, those that he is familiar with, but those that he is not familiar with, of course, would be objectionable. They should be explained by somebody who knows them.

You say that they have handled some of these?

Mr. Owens: I do not know which of the particular ones of these they have handled.

The Court: Well, we can find out from the witness.

By Mr. Owens:

Q. Mr. Sheets, would you examine those issues starting on Government Exhibit 76 and tell us, if you can recollect, which of those were managed by Blyth Company?

A. I believe the Kimberly-Clark issue was an issue in which Blyth & Company was the managing underwriter.

That is the second item on Exhibit 76. I believe the Bank [fol. 448] of America issue in 1952, October 14th, was managed by Blyth & Company.

Mr. Bushby: I beg your pardon, sir?

The Court: A little louder.

Mr. Bushby: I did not read that issue on the sheet.

By Mr. Owens:

Q, Do you mean Transamerica?

A. I am not certain about this, but I think the Bank of America issue in 1952, 1,300,000 shares on October 14, I believe Blyth & Company were a joint manager of that.

Mr. Bushby: I see. Yes.

By the Witness:

A. (Continuing) I think in 1952, May 13th, the Lion Oil issue was managed by Blyth & Company. Those are the only three that I recognize, I believe, as being under the management of Blyth & Company.

By Mr. Owens:

Q. What was that last one?

A. Lion Oil, May 13, 1952.

Q. And what was the underwriting commission of the spread on the Kimberly-Clark?

A. It shows it was $1.85 per share.

Q. And four per cent commission?

A. That would be four per cent of the offering price as they have calculated it.

Q. And on the Bank of America issue on October 14, 1952?

A. That was $1.54 underwriting commission which was five per cent of the offering price.

Q. On the Lion Oil?

A. $1.80, which was 4 per cent.

[fol. 449] Q. How about on the second sheet, Mr. Sheets?

A. The item of May 24th, Rheem, 400,000 shares of stock, was managed by Blyth & Company. I believe that is the only one on the second page in which Blyth & Company was the manager.

Mr. Owens: Well, we offer those documents at the present time for the information which has just been referred to by Mr. Sheets.

The Court: They object to three issues.

Mr. Bushby: Three on the first page.

The Court: Four altogether.

Mr. Owens: One on the second page, your Honor.

The Court: They are admitted as to those four.

(Said documents, so offered and received in evidence, were marked Government Exhibits Nos. 76 and 77.)

Mr. Bushby: Now, are you going to ask him more about these issues? I would like to ask him more about these issues when you are through.

Mr. Owens: About these?

Mr. Bushby: Yes. We want the full story.

Cross-examination.

By Mr. Bushby:

Q. Mr. Sheets, was the Kimberly-Clark issue a secondary or an offering by Kimberly-Clark?

A. I am not certain about that, but I think it was an issue of stock directly from the company. It was a primary issue.

Q. The price on here is $46.375 a share. That was a subscription price at which the rights were offered?

A. I believe these are all offerings for cash and not through rights. I think that was a cash offering.

[fol. 450] Q. Of common stock?

A. Yes. I am not certain of that. The caption here would indicate that it was a straight offering for cash and not a rights offering.

Q. You mean there were no pre-emptive rights in the Kimberly-Clark stockholders.

A. I don't know whether there were pre-emptive rights, whether pre-emptive rights existed there or not.

Q. Do you know what the market was prior to this offering in Kimberly-Clark?

A. No, I do not.

Q. Let me ask you, Mr. Sheets, were you in charge of this issue at Blyth & Co.?

A. No, I was not.

Q. Now let me ask you the same question, Mr. Sheets—this is not criticism, so please don't misunderstand me.

In the case of the Bank of America, do you know about that one?

A. Not similar questions to the ones you have raised as to what the market was prior to this offering. I don't have that knowledge in hand.

Q. Or whether that was an offering to stockholders?

A. I believe it was an offering for cash, not to the stockholders.

Q. You mean on the Bank of America there were no pre-emptive rights to the stockholders?

I am not familiar with any bank charter in this country where its pre-emptive rights have been taken away.

A. That may have been a secondary. It may have come from Transamerica.

Q. You don't know which it was?

A. No, I do not know.

Q. Were you in charge of Lion Oil?
A. No, I was not.
Q. Were you in charge of Rheem?
A. No, I was not.

Mr. Bushby: I would respectfully request that these [fol. 451] exhibits be withdrawn or stricken as to those items which the witness is not familiar with, your Honor.

The Court: I will sustain the motion.

By Mr. Owens:

Q. Mr. Sheets, in connection with the offering of the stock of the Ford Motor Company owned by the Ford Foundation, did your company make a recapitulation of the distribution among the underwriting group; that is part of their business records?

Mr. Owens: I will have the Reporter mark this as Government Exhibit for identification No. 77.

(Thereupon said document was marked Government Exhibit 77, for identification.)

Mr. Bushby: May we see what it is, Mr. Owens, just for our information?

Mr. Owens: Yes. This is a document headed "Recapitulation, Underwriting Group."

I will ask the Reporter also to mark for identification as Government's Exhibit No. 78 "Blyth & Co. Syndicate Department."

(Thereupon said document was marked Government Exhibit 78, for identification.)

Direct examination.

By Mr. Owens (Continued):

Q. Do you have those two documents before you?
A. I don't have the second one that you are referring to there.

Mr. Owens: I ask the Reporter to mark for identification as Government's Exhibit No. 79 a document headed "10,200,000 Shares of Ford Motor Company Common Stock, $5.00 Par Value" the first entry of which is "Underwriters Give Up."

[fol. 452] (Thereupon said document was marked Government Exhibit 79, for identification.)

Mr. Owens: Please correct the record here I think we have two exhibit numbers that are identical. The "Recapitulation Undrewriting Group" should be 78; the printed form document headed "Blyth & Co." should be No. 80.

(Thereupon said document was marked Government Exhibit 80, for identification.)

By Mr. Owens:

Q. Now on the document headed, "Recapitulation Underwriting Group," now Government Exhibit 78, I believe, would you explain to the Court what that breakdown is in terms of the total columns, reading from left to right, Mr. Sheets?

A. Yes.

The left column is a geographical breakdown of the underwriters as to New York City Underwriters, Eastern, Midwestern and Coast, showing the underwriters in that area and their total underwriting interests.

It is a geographical breakdown, so the first column totals the amount of the issue, 10,200,000 shares.

The second column shows the amount that the underwriters retain for their own retail. For example, New York City, the underwriting interest of the underwriters located there was 6,260,000 shares. They retained for their own retail 3,562,395 shares.

Q. That is, they undertook to distribute those shares to the public directly themselves?

A. Themselves, yes.

Q. What is the column, "Shares Given Up To Selling Group," sir?

A. That means the number of shares that the underwriters left with the syndicate managers for distribution to other selling group dealers.

[fol. 453] Q. And is it those shares that are the subject matter of the selling group agreements?

A. Yes, it is.

Q. On which we had an exhibit this morning?

A. Those are the shares that are subject to that agreement.

The next column on the right is the "Shares Given Up To Group Sales."

Group sales were made at the full list price by the syndicate manager to institutional investors, Ford dealers, Ford employees. There might have been a few others that wouldn't fall within those three classifications, but that would have been minor in amount.

The next column to the right is the additional shares in the selling group some of the underwriters had, for their own retail. The amount they retailed plus their share of group sales was more than their underwriting. That was balanced by drawing additional shares in the selling group from the underwriters who had put shares into the selling group.

Does that explain that table to your satisfaction?

Q. Yes, I believe so.

Now, turning to Government Exhibit No. 79, that has in the first column on the left a list of participants. Does that refer to the underwriters who were part of the syndicate in connection with this financing?

A. Yes, it does.

Q. And does that show the breakdown for each of the individual underwriters and portray the same information as that which is Government Exhibit No. 78?

A. It does, that is correct.

Q. Government Exhibit No. 78 has on the lower half of that page "Recapitulation, Selling Group."

Will you tell us what that is, sir?

A. That is a geographical breakdown of the number of dealers participating in the selling group and the number of shares they had.

[fol. 454] For example, the top line shows there were 265 selling group members in the New York City area that received 789,108 shares in the selling group. Of the 265 selling group members, 40 of them were underwriters. And so forth on down for the rest of the territories. That is the domestic selling group only.

Q. Now, on Government Exhibit No. 80, on which the first entry is, "Underwriters Give Up," that first figure there is 1,574,386. That corresponds in amount with the total number of shares given on Government Exhibit No. 78, which is a recapitulation of the underwriting group under the second column, shares given up to the selling group.

This document, I take it, is a breakdown of domestic selling group, rather a breakdown of the shares between the domestic, Canadian and foreign selling groups?

A. That is correct.

Q. I notice that the total of that is 1,724,486, and there is a discrepancy between those figures of 150,100 shares. Would you explain what that difference is between those figures?

A. That represents the syndicate short position. They over-allotted to selling group members, some of whom may have been underwriters, to the extent of 150,100 shares, leaving the syndicate account in that short position.

Q. Was that short position in part incurred as a consequence of stabilization efforts during the offering period?

A. Was it incurred in connection with stabilization? The shares were repurchased during the stabilizing activities. I don't know whether you would say it was incurred.

Q. They were purchased during the course of stabilizing efforts during the offering period?

A. Yes, they were.

Mr. Owens: I offer Government Exhibits 78, 79, and 80.

[fol. 455] Mr. Cox: No objection.

The Court: They are received.

(Said exhibits, so offered and received in evidence, were marked Government Exhibits 78, 79 and 80.)

By Mr. Owens:

Q. Now when you receive subscriptions for group sales, you keep a record of the amount of subscriptions that are received as part of your business records?

A. Yes, we would have kept that record.

Q. Do those records disclose the net amount of the subscriptions that are received from institutional investors?

A. Yes, they should show that.

Mr. Owens: I will ask the reporter to mark for identification Government Exhibit No. 81, which is headed, "Ford Motor Company Common Stock, Breakdown of Requests for Group Offerings of Ford Motor Company Common Stock from Institutional Accounts."

(Thereupon said document was marked Government Exhibit 81 for identification.)

By Mr. Owens:

Q. Do you have a copy of that document before you, Mr. Sheets?

A. I do.

Q. Would you explain that document, sir, as to what it reflects from the business records of Blyth & Company?

A. This is a recapitulation of the orders or subscriptions that came into the firm for group account purchases by institutions prior to the effective date of the registration statement. We would keep a record of that. I will point [fol. 456] out that this is a preliminary record, and not necessarily a final one due to subsequent cancellations and additions.

Q. In connection with the financing of the Ford Motor Company stock in 1956, was that heavily oversubscribed, sir?

A. Yes, it was.

Q. In the first column to the lefthand side, this is broken down into various types of institutional purchases, is it not?

A. That is correct.

Q. Followed by the number of purchases in each of those respective categories?

A. That is true.

Q. The fourth column over indicates subscriptions by classes of institutional investors, and at the bottom, opposite the heading, "Total," is the figure 1,412,250. I note in the next column is the total number of shares for allotment.

Will you explain for us what that column means, sir?

A. Total number of shares allotted?

Q. That is correct.

A. That is a tabulation of the number of shares that were set aside for the various classes of people in this institutional group for confirmation to them.

The next column will show that all of those didn't stand up. There were some cancellations after the allotment had been agreed upon by the manager. So that all of the shares shown in total shares allotted were not actually confirmed and taken by the institutions shown on this tabulation.

Q. What is the reason that there is an allotment of shares that is in a smaller amount than the amount of the subscriptions?

A. I think it was a determination of the syndicate manager that approximately only 10 per cent of the issue would be reserved for sales to institutions, for group sales.

[fol. 457] Q. So that of the amount available for filling orders to group institutions, you did not have as much available as you had subscriptions for that stock, is that correct?

A. That is what this record indicates at this time. I think that is correct.

Q. I see under "Net Subscriptions," total of 1,412,250, against which allotments were made, net shares allotted was 969,782, is that correct?

A. Yes, that is this record. I might emphasize this is a preliminary record. The final confirmations of sales to institutions may have been something under 969,000 due to cancellations and shifts subsequent to this compilation.

Q. That represents here an over-subscription in the amount of about 45 per cent, approximately 45 per cent?

A. Something over 40 per cent of over-subscriptions. We are a little reluctant to accept a subscription as a firm order that will be honored. As long as that is in subscription form and has not been accepted, the institution still has the privilege of reducing that.

Mr. Owens: I will offer Government Exhibit No. 81 into evidence.

Mr. Cox: No objection.

Mr. Bushby: No objection.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Government Exhibit 81.)

Mr. Owens: I will ask the Reporter to mark this Government Exhibit for identification No. 82. This is headed "Analysis of Distribution, 10,200,000 Shares, Ford Motor Company."

(Thereupon said document was marked Government Exhibit 82, for identification.)

[fol. 458] By Mr. Owens:

Q. Do you have a copy of that document before you, Mr. Sheets?

A. Yes, I do.

Q. Would you tell us what this document is, Mr. Sheets?

A. This is an attempt to determine where the 10,200,000 shares that were offered finally rested among individuals, as to different classes of investors and as to different States.

Q. Now did the Ford Motor Company ask you to make a report of in whose hands the shares were lodged as a result of the public offering?

A. Yes. I would like to correct my previous statement a little bit.

This is not in an effort to cover the entire 10,200,000 shares; it is an effort to cover what was retained by the underwriters in selling new members, ex the group sales.

Q. So that referring to Government's Exhibit No. 78 with the recapitulation of the underwriting group, this excludes from analysis of distribution the 2,495,782 that was allotted to group sales?

A. I think that is correct.

Q. This breaks down the distribution of those stocks on the basis of reports that you received from the selling group and underwriting members, is that correct?

A. That is correct.

Q. This is a recapitulation sheet which accumulates the figures on the several similar sheets which were returned by each of the members, underwriters and selling group members?

A. That is correct.

Q. Now, I note down here on "Total," the figure 5,491,761, and on the right-hand side a figure of 6,792,699. Would you tell us what the cause of the discrepancy is there, sir?

A. The figure of 5,491,000 represents the sum of the column above it, which represents sales to individuals, as [fol. 459] reported by the underwriters and selling group members who responded to the questionnaire. The figure on the right, 6,792,000, represents the total of all shares accounted for by the place received. There were about a million shares, distribution records, that hadn't arrived at the time this was compiled, and the effort to assemble it was subsequenly abandoned.

Q. This represents the compilation that Blyth & Co. made for this purpose?

A. Yes, it does.

Q. This is dated March 6, 1956. What would be the status of the availability of this information from the registration books to the Ford Motor Company after that date?

A. You mean the stock registrar of Ford Motor stock?

Q. Yes.

A. They would be able to give—I am not certain of what dates—but it might well have been that all the stock that was transferred into names rather than left in street names, which it might have been delivered in; but some time around this date, the Ford transfer agent should have been able to give a similar breakdown, as their books of registry showed.

Q. In order to calculate from this the percentage of distribution that was a result of individual transactions, as distinguished from these other institutional accounts listed above, would it be accurate to take the total under the "Individuals" column and take that as a per cent of the total on the right hand side?

A. I think that would be reasonable.

Q. That would be 5,491,716 as a percentage of 6,792,699?

A. Yes.

Q. I have calculated that to be 80.8 per cent.

Now there is unaccounted for on this distribution, I take it, a certain number of shares because of the incomplete- [fol. 460] ness of the returns received as of the time this was prepared, is that correct?

A. That is correct.

Q. Is there any reason to believe that had they been available and furnished that the distribution on those would have been any different in character than the distribution here?

A. No reason to believe so at all.

Q. On this document I see at the top, in the various columns reading from left to right there are various categories of institutional investors. I take it that those are sales to institutions that are exclusive of those which were made directly by the underwriters to groups, in the category group sales?

A. That is correct.

Q. So that total of those transactions could be added to what you have set aside for group sales, in order to ascertain approximately the amount of shares of the offering that went to group sales.

A. That went to institutions?

Q. Yes.

A. As I recall, there was a total figure of close to 2,400,000 shares in group sales, and about 900,000 round, that went to institutions. The rest of it did not go to institutions. You would only use the 900,000 in adding it to this to find the insitutional buying.

Q. Included in group sales, did that include the shares that were sold to Ford dealers and employees?

A. Yes, it does.

Q. As well as what we normally consider those institutional investors?

A. That is correct. There was about a million and a half in round amount that went to those categories.

Mr. Bushby: If you are through with this exhibit, I would like to ask one explanatory question about the caption, Mr. Owens.

Mr. Owens: Yes.

[fol. 461] Cross-examination.

By Mr. Bushby:

Q. Referring to Government's Exhibit 82, the headings of the column fourth from the left and fifth from the left: "Commercial Banks," and the other one which is "Trust Companies," that doesn't mean that the commercial banks could buy the stock or the trust companies could buy any stock for their own account, does it?

A. No, that represents stock confirmed to commercial banks; but it was undoubtedly for the account of others. We would have no way of knowing that.

Mr. Bushby: Thank you.

Direct examination (continued):

By Mr. Owens:

Q. In the last printed line on the left-hand side of that document "Number of Transactions, 303,808," for the purposes of clarification, Mr. Sheets, that does not necessarily

mean that there are that many separated and different individual shareholders in the individual category, does it?

A. Not at all. Ten underwriters may have sold the same individual.

Q. And it would show up in ten transactions?

A. Yes, ten transactions in their reports.

Q. In the lower right-hand part of this document, is a breakdown called, "Analysis of Sales." That breaks down, does it not, the sales distributed according to the size of the holdings, showing both in the various categories—one to ten shares; 11 to 25, 26 to 50, 51 to 75, 76 to 100, 101 to 200, and 201 and up?

A. Yes; that, rather than the size of the holdings, the size of the sales—if you take that as a sale.

[fol. 462] Q. Transactions?

A. That is correct.

Mr. Owens: I offer this exhibit.

Mr. Cox: No objection.

Mr. Bushby: No objection.

The Court: It is received.

(Said exhibit, so offered and received in evidence, was marked Government Exhibit No. 82.)

Mr. Owens: I will ask the Reporter to mark for identification Government Exhibits Nos. 83, 84, 85 and 86.

(Thereupon said documents were marked, respectively, Government Exhibits 83, 84, 85 and 86, for identification.)

Mr. Owens: The first document is a letter addressed to me by the Assistant General Counsel of the Ford Motor Company, Wright Tisdale; and the other exhibits are documents that were enclosed with respect to the subject matter of his letter.

Government Exhibit 84 is a copy of a letter from Blyth with a copy to the Ford Motor Company. It contains information with respect to the distribution of the stock made in the underwriting which Blyth & Co. managed.

I offer Government Exhibit 84.

Mr. Cox: No objection.

Mr. Bushby: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 84.)

Mr. Owens: Government Exhibit No. 85, for identification, is a copy of Form 9 furnished to the New York [fol. 463] Stock Exchange by the Ford Motor Company in connection with the listing of the common stock of the Ford Motor Company on the Exhange.

This document shows the distribution of the common stock as of April 12, 1956.

By Mr. Owens:

Q. Approximately how long, Mr. Sheets, would that be, April 12, 1956, after the termination of the offering period of the Ford stock?

A. I believe the offering was terminated about the 31st of January.

May I refresh my memory on that?

If the underwriting agreement was terminated on January 31st, so it would be February, March and twelve days in April—about seventy days.

Mr. Owens: I offer Government's Exhibit No. 85.

Mr. Cox: That is the SEC form, is it?

Mr. Owens: No, it is a Stock Exchange form which shows the distribution of the classes of stock in connection with the application of the Ford Motor Company for listing of the stock on the Exhacnge.

Mr. Cox: No objection.

Mr. Bushby: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 85.)

Mr. Owens: Government Exhibit 86 for identification is a copy of an analysis of holdings of the common stock of the Ford Motor Company as of April 12, 1956, by the type of stockholders and the total shares represented by type.

[fol. 464] Mr. Bushby: How many pages is that?

Mr. Owens: That is three pages.

Mr. Cox: Will you tell us, Mr. Owens, who made that?

Mr. Owens: This is made by employees of the Ford Motor Company and this is the document in specie that they furnished to me, or a copy of the document.

By Mr. Owens:

Q. These documents, Mr. Sheets, which show the distribution of the stock of the Ford Motor Company as of April 12, 1956, would it be fair to say that they would show the results of the distribution as a consequence of the public offering by the group syndicate that was headed by Blyth & Co.?

A. I think the majority of that would be attributable to the underwriters. They would have 70 days of subsequent transactions that might be reflected in your April 12th figure.

Q. But, in general, that is a relatively brief span of time, as far as trying to reflect the nature of the distribution that resulted from the offering by the syndicate, is that correct?

A. That is correct.

Mr. Owens: I will offer Government's Exhibit 83, which is the letter enclosing and identifying these documents and Government's Exhibit 86.

The Court: Are there any objections?

Mr. Cox: No objection.

The Court: They are admitted.

(Said documents, so offered and received in evidence were marked Government Exhibits 83 and 86.)

[fol. 405] Mr. Owens: I have no further questions of this witness.

Mr. Terney: I have one or two questions.

Cross-examination.

By Mr. Tierney (continued):

Q. Have you participated in any offering, secondary offering, of common stock other than this offering that had as many as 722 underwriters?

A. No.

Q. Or of any issue of common stock of a secondary offering that had 1,054 members of a domestic selling group?

A. No.

Q. Or that had 296 financial houses outside of the United States that constituted the foreign selling group, that you know of?

A. I am afraid I couldn't answer that. I wouldn't have knowledge of that number.

Mr. Tierney: That is all.

Cross-examination:

By Mr. Dallstream:

Q. Mr. Sheets, my name is Andrew Dallstream. I am appearing in this case as amicus representing du Pont stockholders. I have two or three questions I would like to ask you.

How long have you been with Blyth & Company?

A. Since January 1, 1936.

Q. And has your entire life in the investment banking business been with Blyth & Company?

A. No, it hasn't.

Q. Whom were you with before that time?

A. I was with the National City Company from 1930 until 1934. Prior to that time I was with W. B. MacMillan Company in Chicago from 1927 until 1930.

Q. Has your entire life in the investment banking busi- [fol. 466] ness been spent in the distribution side of the business, the selling side?

A. Yes, it has.

Q. Have you had anything to do with the setting up, the purchasing department, the setting up of corporate security issues for sale?

A. No, I have not.

Q. And at the present time your connection with Blyth & Company is that of manager of retail sales?

A. That is correct.

Q. And someone else in the department handles the matters of organizing syndicates, the groups of underwriters, and arranging the general stock distribution?

A. That is correct.

Q. And your duties are confined to the retail sales of those securities which Blyth & Company either keeps or purchases when it is a member of a selling group?

A. That is correct.

Q. Do you recall the circumstances of the negotiation and the offering of this issue by the Ford Motor Company, Mr. Sheets?

A. I am sure not all of the circumsances.

Q. Well, you generally remember the background of the offering, the interest, and all, that there was in the offering?

A. Yes, I do.

Q. There was a tremendous amount of newspaper publicity at about the time the offering was under consideration, was there not?

A. That is correct.

Q. During your lifetime, and active as you have been in the investment banking business, and the selling field in connection with that, have you ever encountered such public interest in any security issue before or since?

A. I think not.

Q. It was really the highest accolade in the investment [fol. 467] banking business to be chosen as one of the houses to manage this syndicate, was it not?

A. We were glad to have been chosen.

Q. Do you remember the reports which you received from the invesment houses who participated in the underwriting group and the selling group as to the experiences which they had during the days when they were effecting the sale of this stock?

A. Yes, I am familiar with some of those.

Q. Isn't it true that very few of the investment houses had enough stock to supply the demands of their customers, their established customers?

A. I think that would be a fair statement.

Q. In many cases people were afraid that they would not get some stocks so they put in orders in as many as eight to ten different houses?

A. I would not have any direct knowledge of that, but I expect that that was true.

Q. And people were induced by those who had never had a brokerage account to use their influence at the houses they regularly traded with to get them a few shares?

A. I am sure that happened.

Q. This was really the kind of an issue in which the house was besieged by the customer instead of the house seeking out the customer, wasn't it?

A. Well, I think there were a lot of voluntary customers. I am sure the underwriters and selling groups also took care of their regular customers.

Q. Prior to the time of the offering of this issue, had there been any public stockholders of the Ford Motor Company?

A. I think there probably had been some outside of the Ford family. I heard reports in the early history of the company——

[fol. 468] Q. It was a mere handful, however, of the families of the organizers, was it not?

A. I am sorry; would you repeat that?

Q. It was just a handful of people who were the descendants of the original organizers of the Ford Motor Company?

A. That is right.

Q. At the time this offering was made there was no established market, either on any Exchange or over-the-counter, for the shares of the Ford Motor Company, was there?

A. That is correct, there was none.

Q. The underwriters fixed the price and managed the sale of the only shares that were available for public offering at that time, did they not?

A. That is sort of a combination question. The underwriters and sellers, I would say, agreed on the price.

Q. There were no shares that were being offered in the market in competition with the shares that you were offering?

A. No, there were none.

Q. And so you had no markets to maintain of all the shares that were already outstanding in this case?

A. That is correct.

Q. As a matter of fact, the underwriters themselves recognized that this issue would be in large part sold to those who had never before been buyers of corporate securities, did they not?

A. I do not think that is a reasonable statement. I do not think that is true.

Q. Are you acquainted with the signature of Mr. Limbert of your company?

A. Yes, I know his signature.

Q. Is that his signature (indicating)?

A. I think it is, yes.

[fol. 469] Mr. Dallstream: I ask this be marked Amicus Dallstream Exhibit No. 1.

(Whereupon said document was marked Amicus Dallstream Exhibit No. 1 for identification.)

By Mr. Dallstream:

Q. Are you familiar with this document which was addressed to those who participated in the distribution of securities?

A. I may have read that at one time but I am not familiar with it at the moment.

Q. Are you familiar with the fact that Blyth & Company, the First Boston Corporation, Goldman, Sachs & Co., Kuhn, Loeb & Co., Lehman Brothers, Merrill Lynch, Pierce, Fenner & Beane, White, Weld & Co., and the other representatives of the underwriters through your own organization distributed a letter under date of December 21st, saying: "There is evidence that this offering will produce orders from a very large number of small investors, many of whom have never before purchased securities and who, consequently, have no connection with investment houses"?

A. I think that is a little different than the way you phrased your question. Your question was, "Was it largely sold to people who had never bought before."

I think that was a little bit——

Q. Well, I think you misunderstood me. I did not mean to create that impression. You do agree, however, that there was present a substantial amount of purchases from persons who had not normally been buyers in investment securities?

A. That is true.

Mr. Dallstream: I wish to offer Amicus Dallstream Exhibit No. 1.

[fol. 470] The Court: Any objections?

Mr. Owens: No objection, your Honor.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Amicus Dallstream Exhibit No. 1.)

By Mr. Dallstream:

Q. On the first day or two that this offering was out for public consumption, the price rose from approximately 64½ to approximately 70, did it not?

A. I believe that is about right.

Q. That was quite a substantial rise in price, was it not?

A. It was 5½ points or six points, if that is substantial.

Q. Well, that indicated at least a considerable public interest in the issue, did it not?

A. Yes, it did.

Q. Now, after the issue was out, what was the general character of the market for the next sixty days or ninety days, do you recall?

A. The general market or the market for Ford?

Q. The general market.

A. No, I do not recall.

Q. Would it refresh your recollection if I asked you if it was not true that at or about the time of the Ford issue the Dow Jones industrial averages were at 472 and that by February they were at 495?

A. That would be a matter of a couple of weeks.

Q. You have no independent recollection?

A. No, I have not.

Q. Of the general trend of the market at that time?

A. No, I do not.

Q. Do you recall the trend of the market price of Ford stock for the next three months after the offering?

A. I think initially the stock sold up until—sold above the offering price until about January 26th. That would be [fol. 471] from the 18th to the 26th. I think after that it sold below the offering price.

Q. As a matter of fact, wasn't there a steady decline so that in April it was selling down in the low Fifties?

A. It sold lower than that subsequently. I cannot tie in the dates with the prices.

Mr. Dallstream: That is all.

Mr. Cox: I have no questions.

Mr. Bushby: No questions.

Direct Examination:—(Continued.)

By Mr. Owens:

Q. As far as you recall, Mr. Sheets, and based on the reports received by you as to the purchases of the stock, isn't it a fact that most of the stock was sold to regular investors?

A. I would believe that is true, most of its was sold to investors who had invested before.

Mr. Cox: Can we have that question and answer clarified? Do you mean investors who invested in Ford before or in common stocks?

Can the witness help us at all?

The Witness: They would not have been investors in Ford stock before, because there was none. Just general investors.

Mr. Cox: In common stock, Mr. Sheets, or do you mean any kind of security?

The Witness: Any kind of securities. I think there were a large number of new investors that bought Ford stock but in the total amount of the issue I do not think they bulked exceptionally large.

Mr. Cox: You spoke of the general amount, you mean——

[fol. 472] The Witness: 10,200,000 shares.

Mr. Owens: I will ask to reporter to mark this for identification.

Mr. Bushby: Have you finished your direct examination?

Mr. Owens: I just found those documents.

Mr. Owens: I will ask the reporter to mark these documents as Government Exhibits 87 and 88 for identification, respectively.

(Thereupon said documents were marked Government Exhibits 87 and 88 for identification.)

By Mr. Owens:

Q. Government Exhibit No. 87 for identification, Mr. Sheets, do you recognize that document?

A. Yes, I think that is a document from our files.

Q. Will you tell us what that document is and what the occasion of its preparation was?

A. It is a comparison of certain earnings and asset ratios of General Motors, Chrysler and Ford.

Q. Was it prepared in connection with the establishing of an offering price for the Ford Motor Company stock?

A. I believe it was undoubtedly one of the tools that was used, yes.

Q. Does that bring together a good deal of comparative information relating to those companies?

A. Yes.

Q. For the purpose of facilitating an analysis?

A. Yes.

Q. I note on that page certain penciled entries in addition to the typed entries. Would you tell us, under market closing price, January 11, 1956, opposite that there are some penciled entries, 64½, then 8.1, 15, 12.5 and 15.5—do you know in relation to when this document was pre-
[fol. 473] pared, January 11, 1956, according to the lower right hand corner, when those penciled entries were made on the document?

A. Undoubtedly after January 17, when the price was set.

Q. Will you turn to Government Exhibit 88 for identification, which has dividends written on it in pencil in the upper right-hand corner?

A. Yes.

Q. Did that document come from the files of Blyth & Company?

A. Yes, I believe it did.

Q. Was that document prepared in connection with establishing the offering price of these securities to the public?

A. I think it was.

Mr. Owens: I offer Government Exhibits 87 and 88.

Mr. Cox: May it please the Court, I have no objection to these documents if they are offered merely as proof of the fact that these documents were before Blyth & Company at the time that it was working in preparation for the Ford issue.

Of course, if the documents are offered as proof of the facts stated therein, they raise some different problems. For example, Government Exhibit for identification 87 has an incorporated note above Ford that says, "Integrated

More Vertically—Back to the Mines—Makes only Cars and Trucks."

It doesn't seem to me that this is the right way to show that the Ford Company had gone or was going back to the mines. But, I would accept it as proof of the fact that these documents were prepared, if that is what they are offered for.

Mr. Owens: They are offered in connection with the studies made in connection with the offering price of [fol. 474] the securities to the public, including the dividends, the yields and various other items entered thereon.

Mr. Cox: Let me make myself clear, Mr. Owens. I do not object to these documents if they are offered to prove that Blyth & Company had these documents before it and considered them when they were determining what to do with relation to the Ford issue. If they are offered to prove anything about the integration of any of these companies, or what the dividends of General Motors were at any time, or what the dividends of Chrysler were or what their earnings were, then I submit to the Court that these documents cannot be offered as proof of those facts.

Mr. Burnham: Your Honor, we join in that objection and extend it, if Mr. Cox did not, to all of the supposed facts set forth on here.

We have had no chance to check them. We have no idea whether they are accurate or not.

The Court: Will Counsel state the purpose of these exhibits if they are introduced?

Mr. Owens: I would like to introduce them, your Honor, for the business facts that are recorded thereon. I will, if it is agreeable to the defendants, reserve the moving of the admission of these documents until such time as they have had an opportunity to verify the question of the business facts entered thereon; and if they have any objections at that time, after they have had a chance to verify them, I will reoffer them.

Is that agreeable?

Mr. Burnham: Your Honor, I have no idea how long [fol. 475] it would take to check all these things. There is a vast variety of information on here, much of which seems obviously incorrect because, for example, General Motors is listed with a common stock and surplus of less than four million dollars, which I think is clearly erroneous.

I just think it is the Government's burden to prove these facts by proper evidence and not by pulling something out of the files.

The Court: If they are introduced for the purpose of showing the facts, then you should have someone who knows the contents and who could testify as to their authenticity.

Mr. Owens: I will withdraw the offer of these documents into evidence, and perhaps we can stipulate with respect to this matter with the defendants.

The Court: Very well.

Mr. Cox: You understand, Mr. Owens, I am prepared to admit them to prove that Blyth & Company had them before them and acted on them. I am not objecting to their authenticity or anything in that sense.

Mr. Owens: We will take it from this point, at least, that their authenticity has been established in respect to the business facts disclosed.

Mr. Burnham: No.

Mr. Cox: I am saying I do not object to their use in evidence as proof of the fact that Mr. Sheets or somebody else in Blyth saw these sheets and had them in [fol. 476] front of them when they were working on the Ford issue.

But I cannot, rather, I must object to their admission in evidence as proof of the truth of anything stated thereon.

Mr. Tierney: Inasmuch as your Honor has ruled, I think we do not need to go further with Mr. Cox's objections. You have already ruled as to what you think about it.

The Court: Yes. Let's proceed.

Mr. Owens: No further questions of this witness, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Reycraft: I next refer to a table which bears the heading of, "Table 11, Annual Price Range of General Motors Common Stock, 1948-1958, Stated in Terms of Equivalents of Present Par Value Common Stock."

This has been furnished counsel, and I will ask that it be marked Government Exhibit No. 89 for identification.

(Thereupon said document was marked Government Exhibit 89 for identification.)

Mr. Burnham: Is this the corrected copy?
Mr. Reycraft: Yes. I offer Government's Exhibit No. 89.
The Court: Are there any objections?
Mr. Cox: No objections.
The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 89.)

[fol. 477] Mr. Reycraft: I shall next refer to Table 13 entitled, "E. I. du Pont de Nemours and Company, Statement of Net Operating Income, Other Income, Net Income (After Taxes) Cash Dividends and Retained Earnings, by Years 1948-1957."
Will you mark this as Government Exhibit 90 for identification?

(Thereupon said document was marked Government Exhibit 90 for identification.)

Mr. Reycraft: I offer Government Exhibit No. 90.
Mr. Cox: No objection.
The Court: It is received.

(Said document, so offered and received in evidence was marked Government Exhibit 90.)

Mr. Reycraft: I shall next refer to Table 15, "Dividends Received by du Pont from General Motors, 1948-1958." Will you mark this as Government Exhibit 91 for identification?

(Whereupon said document was marked Government Exhibit 91 for identification.)

Mr. Reycraft: I offer Government Exhibit 91.
Mr. Cox: No objection.
Mr. Bushby: No objection.
The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 91.)

Mr. Reycraft: Will Mr. Emerson resume the stand?

SUMNER B. EMERSON, a witness called on behalf of the Government, having been heretofore duly sworn, resumed the stand and testified further as follows:

[fol. 478] Direct Examination (continued):

Mr. Reycraft: Will you mark for identification as Government Exhibit No. 92, a document which bears in the lower left-hand corner, the numbers 52, 53 and 54, entitled, "Registered Secondary," which relates to General Motors Corporation common stock?

(Whereupon said document was marked Government Exhibit No. 92 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, will you refer to Government Exhibit No. 92 and describe that document?

A. A memorandum prepared by our syndicate department for accounting purposes, covering the pertinent facts in the offering on April 30, 1956 of 1,278,833 shares of General Motors common stock.

Q. What type of offering was that, Mr. Emerson?

A. A registered secondary offering.

Q. Is it an offering with which you are personally familiar?

A. Yes.

Q. Will you state the date on which this offering was made?

A. April 30, 1956.

Q. Referring to approximately the 8th line of this document, can you tell me what time of the day this offering was made?

A. 4:18 p.m.

Q. Can you tell me when the subscription books were closed on that offering?

A. May 1, 1956.

Q. At what time, sir?

A. 1:05 p.m.

Q. Now, will you explain, sir, what transpired between the hours of 4:18 o'clock p.m. on April 30 and 1:05 o'clock [fol. 479] p.m. on May 1st, with respect to this offering?

A. Well, I assume that the registration statement became effective at 4:18 on April 30. Prior to that time, after the issue had been registered, the various dealers and underwriters were entering orders with us, knowing that the offering was going to be coming, and were soliciting, in turn, orders from their clients.

At 4:18, April 30, when the registration statement became effective, they were informed that they could then make definite sales. Up to that time, they could receive orders, but nothing was definite. They were not obligated to sell to the client. The client was not obligated to purchase.

From 4:18 on, they would call all these people that they had tentative orders from, and ask those people if they wished the stock at the offering price of 43¾.

I presume some dealers were trying to get additional stock from us to fill orders, and we were going to dealers and finding out which ones had stock that had not been sold, and we were presumably taking it back in order to fill orders of other dealers, and at 1:05 p.m. on May 1st, we shut that off.

Q. At 1:05 p.m. on May 1st you had completed all of your orders? Was the issue completely sold at that time?

A. Wholesale, yes, sir.

Q. It was wholesaled completely?

A. It was completely wholesaled.

Q. Do you know how long after that the retailing was completed?

A. Well, it was very largely completed by then, but there may have been—there undoubtedly were some under-
[fol. 480] writers who had not sold all of their stock, and some members of the selling group.

Q. Did the dealers engage in the same practice as the underwriters in building up a book prior to the offering?

A. Yes.

Q. Do you know whether their experience in this particular offering resulted in their having full orders shortly after this closing of the books?

A. I don't understand the question, Mr. Reycraft.

Q. Well, basically, the question is, do you know whether the selling group was successful in completing the retailing shortly after 1:05 o'clock p.m. on May 1st?

A. I have no knowledge by memory. I assume that the position was the same as the underwriters—that by 1:05

p.m. on May 1st, they had largely sold their stock. There is nothing in here, however, that would indicate whether that was true or not.

As a matter of fact, insofar as the selling group is concerned, we would never know.

Q. Once you had sold the stock, as far as you were concerned, you were out of it?

A. Once we have sold the stock to members of the selling group, it is their stock, and we don't check them afterwards, normally.

Q. As far as the seller is concerned, when is the seller's part of the transaction completed? In other words, when does title pass to the wholesalers?

A. You mean from the Sloan Foundation to the underwriting group?

Q. Yes, sir.

A. We signed the underwriting agreements on April 30th, 1956. The stock wasn't delivered until May 8th, 1956. And your question is when did the sale take place?

[fol. 481] It is a matter of definition.

Do you mean when we signed the contract, or when the actual delivery was made?

Q. When the actual passage of title of the stock occurred between the seller and the underwriters.

A. That is a legal question that I am not competent to answer.

Q. Mr. Emerson, referring to the spread on this particular issue, will you explain the components of the spread as they are set forth here?

A. Will I explain the what?

Q. Will you explain what they are, the components of the spread?

A. The gross spread was $1.35, of which 15 cents was the management fee to Morgan Stanley and Company for managing the distribution; 30 cents went to underwriters for their commitment. That 30 cents would have been subject to the underwriting group's expenses. 90 cents went to the person who sold the stock, to the firm who sold the stock.

Q. And would you explain the 25 cents reallowance which appears on the page?

A. That would mean that any member of the selling group or of the underwriting group could resell to another dealer at the offering price, less 25 cents. I don't see that on this page, but I assume——

Q. It follows, "Selling Concession 90 cents." Then if you will move over, you will see, "25 cents Reallowance."

A. Oh, yes, I see it.

Q. How many underwriters participated in this offering, Mr. Emerson?

A. 259.

Q. Did your firm engage in stabilizing transactions with respect to this issue?

A. I find no reference to stabilization here at all.

[fol. 482] Q. Will you refer, Mr. Emerson, to the bottom line?

A. I am sorry—I was looking at the wrong page.

Q. Yes.

A. It says, "Stabilization Transactions Commenced April 30, 1956."

Q. Will you explain the filing requirements for the stabilization transactions?

A. I think the number of the SEC rule is 17-A—something, which covers stabilization transactions on registered issues.

Once the manager has made the stabilizing transactions, he has to report those daily to the SEC; and members of the underwriting group, after stabilization has been commenced by the manager, must also report their purchases and sales to the SEC.

Q. And you were not required to file?

A. It says, "Filing Not Necessary," and I assume that is what it covers.

Q. Referring to the second page of this document, do the figures at the top of the page set forth the stabilization bids which were entered in this transaction?

A. My copy is so illegible that I can't even read the headings.

Q. Let me read it—"Syndicate Bid Entered Through the Following Orders were Entered on the New York Stock Exchange through Jessup & Lamont," I believe. Then

there are a series of dates, times, quantities, shares purchased, a column headed, "Order Cancelled," and another column headed, "Time Cancelled."

A. It looks as if we purchased 23,624 shares.

Now whether that was for the purpose of stabilization or whether that was to cover over-allotments is not clear.

[fol. 483] Q. Along at the top of the page, "Syndicate bid entered," does that disclose anything with respect to whether it was stabilization or over-allotment?

A. No, that would not mean anything; it would be a syndicate bid in either case.

Q. Mr. Emerson, do you know how many shares were actually sold by the underwriters in this offering, as distinguished from the number of shares offered by the seller?

Was this issue oversold?

A. Well, the tabulation on Page 3 indicates the original offering to underwriters and dealers—the amount that some of them released back to the group—apparently being unable to sell it. We then made additional allotments to other underwriters and dealers, and in that way built up a short position, which was covered in the market; the short position was 23,624 shares. I can't tell from this whether that was just covering over-allotment or whether it was a stabilization bid.

I gather that it was an over-allotment.

Q. On the extreme right-hand column on the third page, under the heading, "Total," the fifth line down, the figures 1,302,457 appear.

A. Yes.

Q. Do those figures indicate the total number of shares sold by the underwriters?

A. It means the amount that we released to underwriters and sold to selling group members.

Q. You actually delivered this many shares to purchasers?

A. Yes.

Q. As compared with a total of 1,278,833 shares which you actually contracted to sell?

A. That is correct.

[fol. 484] Q. And if you will refer to the line which begins, "Total Expenses," will you indicate the dollar amount of the expenses of making the sale?

A. Which page are you looking at?

Q. The third page.

A. And what is your question?

Q. What did it cost the seller to sell the stock?

A. $1.35 a share.

Q. Does the figure $66,882.96 after the words "Total Expenses" indicate that this is the seller's total cost?

A. No. Those aren't the seller's costs; those are the underwriting group's costs, expenses.

Q. What other costs are indicated on this page?

A. We lost in our trading account $37,372.75.

Q. Can you compute from the figures set forth on this page the total cost to the underwriting group of selling this amount of stock?

A. I don't know what your question means, Mr. Reycraft.

Q. Well, after the line "Federal and New York State Transfer Tax," there appears the figure $11,628.08. Is that one of the costs of selling the stock?

A. Yes, sir.

Q. The next figure after "Total Expenses" is $66,882.96.

A. Yes.

Q. Is that one of the costs of selling it, or does that include the tax?

A. That apparently includes the tax and includes other items, such as advertisement or legal fees, printing, telegraph, telephone, and so forth.

Q. Then the figure at the bottom of the page, $37,372.75, is that an additional cost to the line entitled "Total Expenses"?

A. It is not clear from this, but I think that that is in addition to the $66,882.00.

[fol. 485] Q. So that the total cost to the underwriters, so far as appears from this document, would be in the neighborhood of $105,000.00? Would that be accurate?

A. Well, that would be the total amount of expenses and trading losses charged to the underwriting group.

For instance, all sales that were made to dealers in the selling group. There was a concession there of 90 cents a share. That came out of the underwriters somewhere.

Q. That came out of the underwriters?

A. That is not listed here in the expenses.

Q. Are these costs subtracted from the management fee and the underwriters' fee, which were set forth on the first page—15 cents and 30 cents?

A. Which ones do you mean now?

Q. On the first page.

A. Yes, I know what you mean there. But what are you subtracting from?

Q. I am trying to figure out where you subtract these costs. Does it come out of the management fee? Who pays it?

A. The 30 cents per share of the underwriters.

Q. Thank you. That is the answer.

Mr. Reycraft: Will you mark for identification the document which bears the numbers 304 through 311?

Mr. Bushby: Are you through with that issue?

Mr. Reycraft: No, sir, I am not.

Mr. Bushby: This is on the same issue?

Mr. Reycraft: Yes.

(Continuing) Dated April 5, 1956.

(Thereupon said document was marked Government Exhibit 93, for identification.)

[fol. 486] Mr. Reycraft: That is Exhibit 93 for identification.

Mr. Bushby: While we are waiting, could I ask Mr. Emerson one question with regard to that exhibit that you were just dealing with?

Mr. Reycraft: Surely.

Cross-Examination.

By Mr. Bushby:

Q. Mr. Reycraft asked the question if the $66,000 plus the trading loss represents your total cost, the underwriter's total cost, in connection with that underwriting. But you don't charge a large share of your cost at all, isn't that true; you don't charge your rent and your light, the cost of your stenographers, and your typewriter?

A. None of that is charged to the group.

Q. So that in figuring all the money you make, you have some other things to think about in the way of deductions?

A. All of our overhead. None of that is included in there at all.

Mr. Bushby: That is all.

Direct Examination:—(Continued)

Mr. Reycraft: I offer Government Exhibit 92.

The Court: It may be received.

(Said document so offered and received in evidence was marked Government Exhibit 92.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit 93 for identification. Will you describe that document, Mr. Emerson?

A. What was your question?

[fol. 487] Q. Will you describe the document?

Are you familiar with this document, Mr. Emerson?

A. I have seen it before, yes.

Q. Can you identify the initials, "H.B.L." which appear on the eighth page?

A. Yes, Hudson B. Lemkau.

Q. Who is Mr. Lemkau?

A. He is a partner of our firm.

Q. Did you participate in the negotiation of the underwriting fees for this issue?

A. Of the underwriting fees?

Q. Yes.

A. No.

Q. Are you able to identify this document as one which came from the files of your company?

A. Yes.

Q. Will you read the sentence on the bottom of the first page of this document?

A. (Reading):

> "The announcement of registration of an offering of this size may depress the market for GM on the Stock Exchange, but the twenty-day waiting period would give the market time to adjust itself for the offering."

Q. Will you turn to the second page, Mr. Emerson, and will you read the sentence which appears on the bottom of that page?

A. (Reading):

"In view of the similarity of the circumstances surrounding this proposed offering with the recent offering by the Ford Foundation of Ford Motor Company common stock, certain ratios are explored on the next page."

Q. Will you read the sentence on the bottom of the third [fol. 488] page?

A. (Reading):

"The last secondary in General Motors Corporation common stock according to our records occurred on September 21, 1948, when Harriman Ripley & Co., Incorporated, and Blyth & Co. Inc. made a non-registered offering of 30,000 shares at 60⅝."

Q. Will you now turn to Page 5 of that document, and will you read the first senfence?

A. (Reading):

"The problem in placing approximately $60 million of the listed stock of a well-known company with over 538,000 common stockholders is resolved essentially by payment of an adequate fee to dealers to find new buyers and persuade present stockholders to increase their holdings."

Q. Will you go on to the next paragraph and read the first sentence:

A. (Reading):

"We believe this block could be placed successfully with a selling concession of 90 cents which would be slightly in excess of two times the Stock Exchange Commission plus five cents to cover the 4.12 cents transfer tax."

Mr. Reycraft: I offer Government's Exhibit No. 93.

Mr. Cox: May I ask a Question?

Mr. Reycraft: Certainly.

Cross-Examination.

By Mr. Cox:

Q. Mr. Emerson, do you recall having seen this document in 1956 when it was prepared?

A. No, sir.

Q. Did you participate in any way in writing this document?

A. No.

[fol. 489] Mr. Cox: May it please the Court, I should like to call the Court's attention to a statement on Page 4 of this document, at the foot of the page, which Mr. Reycraft, did not have Mr. Emerson read.

The statement follows:

> "The proposed offering differs from that of the Ford stock because GM already has over 538,000 common stockholders, whereas Ford was a new name for investment portfolios."

By Mr. Cox:

Q. Now, I should like to direct your attention to the first passage in this document, which Mr. Reycraft asked you to read, which is the sentence at the foot of the first page.

Do you see that expression of opinion by—what was the author's name?

A. Lemkau.

Q. I call your attention to this expression of opinion by Mr. Lemkau, and I ask you, in your experience, if it is true that the announcement of a registration of an offering of this size may depress the market for GM on the Stock Exchange? Is that consistent with your experience?

A. Yes, sir.

Q. I will read you the rest of it:

> "But the 20-day waiting period would give the market time to adjust itself for the offering."

Is that also consistent with your experience?

A. Yes. What Mr. Lemkau was trying to say—and he probably didn't make it clear—was that once the offering of this size were announced, there would be an impact on the

[fol. 490] price of General Motors on the stock exchange. Presumably, the announcement would be made at the time of the filing of a registration statement.

Then during the 20-day waiting period, which is the period required under the Securities Act before the registration statement becomes effective, the market would descend some amount and would stabilize at a lower price.

Q. Was the price lower than the price on the date of the announcement of the registration?

A. Yes, other things being equal.

Q. Now, let me direct your attention to the statement at the foot of Page 2 of the memorandum which Mr. Reycraft asked you to read:

> "In view of the similarity of the circumstances surrounding this proposed offering with the recent offering by the Ford Foundation of the Ford Motor Company common stock, certain ratios are explored on the next page."

Were there certain similarities between the secondary offering of Sloan stock to which this document refers and the secondary offering of the Ford Foundation stock?

A. There were certain ones. This memorandum was prepared so that the members of the firm could discuss what the proper underwriting spread should be. I do not know whether this memorandum was given to the General Motors Corporation or not.

Usually in our firm if it is given out it is so marked on it. It is not so marked on this. So I assume that this was written purely for the information of the partners of the firm.

[fol. 491] Now, we knew that with a large offering of General Motors stock coming within a few months of the time of a large offering of Ford stock, both of them being very large companies in the same line of business, that the Sloan Foundation would look at the terms that the Ford Foundation received and, therefore, Lemkau was trying to spell this all out so that we could see what would be going through the mind of the Sloan Foundation and to get ready to negotiate an underwriting spread.

Q. Were these offerings both secondary offerings?

A. They were both secondary offerings.

Q. Oddly enough, they were both being offered by a Foundation, is that right?

A. Both by Foundations, both of motor companies, and both of substantial size.

Q. Now, were there some differences or dissimilarities between the two secondary offers?

A. Oh, yes, sir. The Ford offering was made when no Ford stock had ever been in the market before, in the general market. There was any amount of General Motors stock outstanding at the time. I suppose the amount would have been about 90 million shares—oh, no, this is after the split and after the equity financing, so it would be about the present number of shares, 284 million.

As of this time the General Motors Company had already had over half a million common stockholders which was, I feel quite sure, the largest number of common stockholders of any industrial company.

Q. Directing your attention to the statement at the foot of page 4 of this memorandum of Mr. Lemkau's, which reads:

> [fol. 492] "The proposed offering differs from that of the Ford stock because GM already has over 538,000 common stockholders, whereas, Ford was a new name for investment portfolio."

That is a statement that refers to the point that you have just made, am I correct?

A. That is correct.

Q. Let me direct your attention to the passage at the top of page 5, which Mr. Reycraft asked you to read:

> "The problem in placing approximately sixty million dollars of listed stock of a well-known company with over 538,000 common stockholders is resolved essentially by payment of an adequate fee to dealers to find new buyers and persuade present stockholders to increase their holdings."

Let me ask you this question, Mr. Emerson: is there any difference, referring again to the secondary offer of the Ford stock, with respect to the solution of this prob em that is described in the sentence I just read when there are half a million existent stockholders as against a situation where the stock had never been offered on the market before?

A. Well, the problems are utterly different. Where there is no stock outstanding every investor in the country is a potential buyer. Here you already have that 538,000 people who had all the General Motors they wanted, and they were the important buyers of the country in most cases.

Mr. Cox: That is all.

Direct Examination:—(Continued)

By Mr. Owens:

Q. Mr. Emerson, in order that the two paragraphs may appear in the record in sequence without either one being [fol. 493] out of context, will you begin at the bottom of page 4 and read through the first two paragraphs?

A. At the bottom of page 4 and read how far?

Q. That paragraph and the following paragraph.

A. (Reading)

"The proposed offering differs from that of the Ford stock because GM already has over 538,000 common stockholders whereas, Ford was a new name for investment portfolios.

"The problem in placing approximately 60 million dollars of a listed stock of a well known company with over 538,000 common stockholders is resolved essentially by payment of an adequate fee to dealers to find new buyers and persuade present stockholders to increase their holdings."

Q. And will you read the next sentence, pease?

A. (Reading)

"In February and March of 1955 approximately 50 million dollars of General Motors was placed during the period of the company's stockholder offering. The

layoff prices of 93⅛ to 99 adjusted for the three-for-one split means these new purchases have a cost base of 31 1/24 to 33, in contrast to the present market price of 45¼."

Q. And will you read the first sentence of the next paragraph?

A. "We believe this block could be placed successfully with a selling concession of 90 cents, which would be slightly in excess of two times the stock exchange commission plus five cents to cover the 4.12 cents transfer tax."

Q. Now, Mr. Emerson, I believe you said that General [fols. 494-495] Motors stockholders had all the stock they wanted, all the General Motors stock they wanted?

A. They certainly had every opportunity in the world to buy it, yes.

Q. Now, despite that fact, one of your problems in this particular offering of stock was, as the first sentence on this page indicates, "To find new buyers and to persuade present stockholders to increase their holdings;" is that correct?

A. That is correct.

Q. And you apparently were successful in doing that, were you not?

A. That is correct.

The Court: Let us adjourn for the time.

The Marshal: This Court is adjourned until Tuesday at ten o'clock.

(Whereupon an adjournment was taken in the above-entitled cause until Tuesday, February 23, 1959, at ten o'clock a.m.)

[fol. 496]

Transcript of Proceedings of February 24, 1959

The Court: Counsel may proceed.

Mr. Metzger: The Government calls as its first witness this morning Mr. Clarance Stanley.

CLARANCE STANLEY, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Metzger:

Q. Mr. Stanley, would you state your name, and business address?

A. I can't quite hear you.

Q. Would you state your name and business address?

A. Clarance Stanley, General Motors Corporation, New York City.

Q. What is your function with that organization, sir?

A. I am Pension Co-Ordinator.

The Court: Will you speak a little louder, please?

By the Witness:

A. (Repeating) Pension Co-Ordinator.

By Mr. Metzger:

Q. What duties does that function entail?

A. The duties consist of assisting the Trustees to develop and carry forward plans for the Pension Fund, in accordance with the general investment pattern which has been in effect since the funds were established.

Q. Would you explain what these funds are, sir?

A. There are two funds: the hourly fund, and the salary fund.

Q. Will you continue, sir? Would you explain that in a little more detail?

A. These funds are established to pay pensions for hourly employees and salaried employees.

The Court: To what class of employees?

[fol. 497] The Witness: Hourly employees and the salaried employees.

By Mr. Metzger:

Q. What formula is established for determining what benefits are to be received by the two types of employees you have mentioned?

A. I am not in a position to answer that question, because that is not included in my duties.

Q. Do you know the answer to that question?

A. No, I don't.

Q. Do you know the extent of the sum on a contribution basis, of the contributions to this fund to date?

Mr. Tierney: Your Honor, I can't hear Mr. Metzger.

The Court: Proceed.

Mr. Tierney: I haven't heard a word he has said. He is probably standing too close to the microphone.

The Court: Speak in front of the microphone, so we can hear you.

By Mr. Metzger:

Q. Mr. Stanley, what is the total amount of dollars in these General Motors non-contributory pension funds at the present time?

A. As of December 31, 1958, they amounted to approximately 776 million dollars.

Q. When did these funds begin, sir?

A. November 1st, 1950.

Q. What is their present rate of growth?

A. The present rate of growth is at approximately 100 million dollars a year.

Q. Are you informed, sir, of the amount of money which [fol. 498] will be forthcoming in any given year?

A. I am advised month by month of the amount of money that is being paid into the fund.

Q. Do you have any idea, sir, whether this present rate of growth of 100 million dollars per year is anticipated to continue?

A. Anticipated to?

Q. To continue, at that rate, or a higher rate?

A. I wouldn't know at what rate it will continue.

Q. Do you have any reason to doubt that the growth will continue at its present rate?

A. I think it would be about its present rate for a few years.

Mr. Metzger: Will the reporter please mark this document Government Exhibit 94 for identification?

(Thereupon said document was marked Government Exhibit 94 for identification.)

By Mr. Metzger:

Q. Mr. Stanley, I show you Government's Exhibit 94 for identification, and I ask you, sir, can you identify this document?

A. Yes, sir.

Q. Would you state the nature of the document, sir?

A. It is a letter addressed to each of the trustee banks, of which there are seven, by Mr. Bradley, setting forth the general understanding between the trustees and the corporation as to the investment pattern for the funds.

Q. Is the investment pattern set forth in this document in effect at the present time, sir?

A. Yes, sir.

Q. Do you know of any present plans to change this document?

A. No, sir.

Mr. Metzger: I offer in evidence Government's Exhibit 94.

Mr. Tierney: No objection.

[fol. 499] The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 94.)

Mr. Metzger: Will the reporter please mark this document as Government's Exhibit 95 for identification?

(Whereupon said document was marked Government Exhibit 95 for identification.)

By Mr. Metzger:

Q. Mr. Stanley, I show you Government's Exhibit 95 for identification. I ask you, sir, if you are familiar with the document identified as Government's Exhibit 95?

A. I am.

Q. Was it prepared under your general supervision?

A. No, I don't think so.

Q. Are you prepared to attest to its accuracy?

A. Yes.

Mr. Metzger: I offer Government's Exhibit No. 95.

Mr. Tierney: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 95.)

Mr. Bushby: Would you identify it by date, to whom and, from whom, for the record?

Mr. Metzger: Yes.

For the record, Government's Exhibit 94 is dated November 8, 1950. It is a letter addressed to the National Bank of Detroit, 660 Woodward, Detroit 32, Michigan; and it is signed by Albert Bradley, Executive Vice President, General Motors Corporation.

Government's Exhibit 95 is a document on General Motors stationery, entitled, "GM Non-Contributory pension [fol. 500] Trusts—U. S. Trustees' Purchases of General Motors Common Stock, one and two-thirds par value shares."

Q. Now, Mr. Stanley, I note that this document refers to seven trustee banks, the National Bank already mentioned, Chase Manhattan, Guaranty Trust, and J. P. Morgan of New York. Is that the Mellon National Bank of Philadelphia?

A. The Mellon National Bank & Trust Company of Pittsburgh.

Q. And the Old Colony Company of Boston?

A. Right.

Q. And the First National Bank of Chicago.

I note, sir, that certain limitations are set forth in this document as to the amount of money which any of these

trustees may assign to common stocks. What is that figure, sir?

A. They may buy up to 35 per cent of the total fund in common stocks.

Q. In common stocks, generally?

A. Excluding bank and insurance stocks.

Q. And they may buy bank and insurance common stocks——

A. Up to 15 per cent of the total fund.

Q. Has this policy been generally followed?

A. Yes, indeed.

Q. Has it been satisfactory?

A. Yes, sir.

Q. And your investment experience has been satisfactory?

A. Yes, sir.

Q. I note several allusions in this document, particularly on Pages 2 and 3, to limitations upon the activities of the trustees in the nature of possible changes in the form of this plan by General Motors.

[fol. 501] Do I take it, sir, that General Motors has retained in its agreements with each of the several banks the right to change the nature of the commitment with these trustees?

Mr. Tierney: Just a moment. I object to that question as calling for this witness' incompetent opinion and conclusion.

Mr. Metzger: We haven't established yet, sir, whether it is competent or incompetent.

Mr. Tierney: He is incompetent to give the opinion if he doesn't know anything about it.

Sometime, your Honor, I would like to make a statement about these pensions and trusts.

Mr. Metzger: It is your privilege.

Mr. Tierney: They are so established, your Honor, that the changes can't be made with respect to them that would deny them of the tax privileges that they have.

In other words, these trusts are established, as will appear later, for the exclusive benefit of the employees, and should they be used in any fashion other than for the exclusive benefit of the employees, there could be no deduction under the tax laws for the pension, for the amounts paid

into the funds, and moreover, the pension funds or the income of the funds would be subject to tax.

So I want you to know that our position is that there can't be changes that would defeat the purpose of them being exclusively operated for the benefit of the employees.

Mr. Metzger: Your Honor, I submit that the statement made by Mr. Tierney is in the nature of testimony, and until such testimony is adduced, it must have no bearing on the rulings of the Court on the question addressed to this witness.

[fol. 502] The Court: Does the witness feel competent to answer this last question?

The Witness: Would you repeat the question, please?

(Question read)

Mr. Tierney: The instrument itself is the best evidence, and this calls for a legal opinion.

The Court: He may answer.

By The Witness:

A. I don't feel competent to answer the question.

By Mr. Metzger:

Q. Let me try this question. As Co-Ordinator of Trustees, do you have the right to indicate to any of these bank trustees a change, a basic change, in their investment policy?

A. No, I have not.

Q. Does anyone in the General Motors organization have that right?

A. That I do not know.

Q. I call your attention, sir, to the first full paragraph on page 3 of this document, the limitation:

> "Will avoid any possible charge that control or management responsibility is being acquired in any company through the pension funds——"

and I skip several lines——

> "Trust funds in the voting stocks of any one company do not exceed 5 per cent of such company's voting stock."

Has this policy been carried out, sir, under your supervision?

A. Yes, indeed.

Q. You have made it a point to determine that the in-[fol. 503] vestment in any one company does not exceed 5 per cent for this reason?

A. We have a list made up monthly showing percentage of voting stocks.

Q. Now, sir, I call your attention to the third full paragraph on that page:

> "It is recognized that there will be available from time to time private placements, unlisted securities," et cetera.

Has that occurred?

A. Yes, indeed.

Q. Have such purchases been made?

A. Yes.

Q. Under your supervision or general direction?

A. No——

Mr. Tierney: Just a minute.

Mr. Metzger: The instrument merely states what should be done.

Mr. Tierney: I am objecting to the question, because it is double-barreled: (1), it asks whether it has been under his supervision, and (2) whether it has been under his direction. I object to the form of the question.

The Court: Sustained, as to the form.

By Mr. Metzger:

Q. Mr. Stanley, to your knowledge have such private placements been made?

A. They have been acquired by the trust funds, yes.

Q. And such private placements will be made in the future?

Mr. Tierney: I object to that. The witness is not competent. Under the Trust Agreement he has no direction or any control over it.

The trust instrument, which I think should be put in evidence, shows that the investment of these funds is within

[fol. 504] the discretion of the trustee. I object to the question.

Mr. Metzger: If necessary, the Government will, at the proper time, call the Trustees in order to ascertain what has been done on this. The technical objections directed to this proposition do nothing more than to lengthen an overly protracted situation.

Mr. Tierney: That is obviously your determination, what you are going to do.

The Court: If he has knowledge of the subject, he may answer.

The Witness: What is the question?

(Question read.)

By The Witness:

A. I expect they will be made, but I don't know to what degree.

By Mr. Metzger:

Q. Now, sir, will you turn to Government Exhibit 95. This document, I take it, is a total of the purchases of these trustees independent of any judgment of your own?

A. Yes, indeed.

Q. Of General Motors stock?

A. That is right.

Q. Up to October 31, 1958?

A. Yes.

Q. Do you know what those purchases were for the full year of 1958?

A. The information is available. I do not have it with me. Mr. Tierney has it.

Mr. Metzger: Mr. Tierney, could you produce that?

Mr. Tierney: Yes.

[fol. 505] By the Witness:

A. (Continuing) For the full year 1958, the purchases amounted to 18,600 shares at a cost of $696,152.

Mr. Metzger: That is the same as at the end of October 31.

Mr. Tierney: That is the testimony.

By Mr. Metzger:

Q. Government's Exhibit 95, sir, states that as of October 31, 1958, 18,600 shares were purchased?

A. Yes, sir.

Q. And you just repeated that figure?

A. Yes, sir.

Q. Of your own knowledge were there any purchases between October 31, 1958 and December 31, 1958?

A. I can't answer positively. I would think there probably were. I think this may be a mistake.

Mr. Tierney: Can you find out and be prepared to tell us later?

The Witness: Yes, indeed.

Mr. Metzger: If it is acceptable to the Court and to Mr. Tierney, this information was sought before, and it was stated that it would be supplied. If Mr. Tierney will make a stipulation in the record, I don't think it will be necessary to recall Mr. Stanley.

Mr. Tierney: We will supply it.

Mr. Metzger: I have no further questions.

Cross-examination.

By Mr. Tierney:

Q. Mr. Stanley, are you a director of General Motors?

A. No, sir.

Q. Do you serve on any other committees of General Motors?

A. I do not.

[fol. 506] Q. When did you assume your duties with General Motors?

A. December, 1950.

Q. You were employed by General Motors as coordinator of the pension trusts?

A. That is right.

Q. At the time you assumed your duties, the trust agreements had been executed?

A. Yes, sir.

Q. And Exhibit No. 94, dated November 8 was in full force and effect?

A. Yes, sir.

Mr. Tierney: I would like to have this marked as General Motors Exhibit No. 1 for identification.

(Thereupon said document was marked General Motors Exhibit 1 for identification.)

By Mr. Tierney:

Q. Mr. Stanley, I show you a document marked for identification as General Motors Exhibit 1, which is entitled, "General Motors Hourly Rated Employees' Pension Trust, The First National Bank of Chicago, Trustee" and ask you if this is one of the trust agreements that was in effect when you assumed your duties as coordinator?

A. Yes, sir.

Q. Now were there similar trust agreements for other banks in force and effect?

A. Yes, there were.

Q. And those appear in Government's Exhibit No. 94, do they not?

A. The names of the banks?

Q. Yes.

A. Yes, sir.

Q. And those banks are The National City Bank of New York——

A. No, sir.

Q. No, the Chase National Bank of the City of New York?

A. Yes.

Q. Guaranty Trust Company of New York?

A. Yes.

Q. J. P. Morgan & Company, Incorporated?

A. Yes.

[fol. 507] Q. Mellon National Bank & Trust Company?

A. Yes.

Q. Old Colony Trust Company?

A. Yes.

Q. And the First National Bank of Chicago, is that correct?

A. And the National Bank of Detroit.

Q. And the National Bank of Detroit?

A. Yes, sir.

Q. Seven in all?

A. Yes, sir.

Mr. Tierney: I will ask that this document be marked General Motors Exhibit 2 for identification.

(Thereupon said document was marked General Motors Exhibit 2 for identification.)

By Mr. Tierney:

Q. I show you a document marked for identification General Motors Exhibit 2, entitled, "General Motors Noncontributory Pension Trusts."

Was that trust agreement in force when you went to work for General Motors?

A. Yes, sir.

Q. That differs from Exhibit 1 in that it applies to the salaried employees?

A. Right.

Q. Exhibit No. 2 differs from Exhibit No. 1 in that Exhibit No. 2 applies to salaried employees——

A. That is right.

Mr. Metzger: Are you offering for identification Exhibit No. 2?

By Mr. Tierney:

Q. Exhibit No. 2 differs from Exhibit No. 1 in that No. 1 applies—Exhibit No. 2 applies to salaried employees whereas Exhibit No. 1 applies to hourly rated employees. Do I have that right?

A. Right.

[fol. 508] Q. I call your attention now——

Mr. Tierney: We offer in evidence Exhibits 1 and 2.

Mr. Metzger: No objection.

The Court: They are admitted.

(Said documents, so offered and received in evidence, were marked General Motors Exhibits Nos. 1 and 2.)

Mr. Tierney: At this time I would like to call the Court's attention to certain language on page 1 for the hourly rated employees. That is exhibit number—I cannot read these numbers.

The Reporter: Exhibit No. 1.

Mr. Tierney: Exhibit No. 1; that relates to the hourly rated employees. I would like to read to your Honor from page 1:

> "Whereas it is contemplated that some subsidiaries may become inactive or may cease to be subsidiaries of the corporation, or may independently terminate the plan as to themselves, and other subsidiaries may be formed or acquired by the corporation and may not adopt the plan and whereas it is contemplated in the plan that the contributions thereunder shall be made for the exclusive benefit of hourly rate employees of the corporation and its participating subsidiaries, and that no part thereof may at any time prior to the satisfaction of all the liabilities under the plan be used for or diverted for any other purpose."

Also, if your Honor please, I would like to call your attention to Article 9 on Page 10:

> [fol. 509] "Irrevocability" it is entitled.
>
> "The trust hereby created shall be irrevocable and anything contained in this agreement to the contrary notwithstanding, it shall be impossible at any time prior to the satisfaction of all liabilities with respect to employees and pensioners under the plan for any part of the fund to revert to the corporation or to its subsidiaries or to be used for or diverted to purposes other than the exclusive benefit of such employees and pensioners or for the payment of taxes and administrative expenses."

By Mr. Tierney:

Q. Now, Mr. Stanley, will you tell us again what your duties are with respect to coordination?

A. My duties are to assist the trustees in carrying out an investment program which will conform with the investment pattern which was established at the time the trusts were established.

Q. And that investment pattern, is it that which appears in the exhibit identified and in evidence as No. 94?

A. It is a letter of November 8, 1950.

Q. And that bears Exhibit No. 94?

A. I have not got it on here.

Q. Yes, 94; is that correct?

A. Yes.

Q. Do you compile any data or make any reports on the performance of these trusts?

A. Yes, sir.

Q. And do you assist the trustees in carrying out that program or that policy?

A. That is right.

Q. Have you anything to do with the selection of securities to be purchased by the trustees?

[fol. 510] A. No, sir, my duties do not involve any advice or recommendation in respect to the selection of individual securities.

Q. Now, will you briefly tell us—referring now to Exhibit No. 94—and give us briefly what this program that the trustees have determined as prudent in that letter of November 8, 1950—what the limitations are within that? Just briefly summarize them, if you will.

A. Well, the trustees may invest up to 35 per cent of the combined funds of each plan in common stocks, other than bank and insurance stocks and an investment up to 15 per cent of the total assets of the funds in the discretion of the trustees in preferred stocks, bank stocks and insurance stocks, leaving a balance of 50 per cent of the combined funds to be available for fixed income securities.

Q. Now, are there any lists of limitations regarding common stock investments?

A. Yes, sir, there are. Investments in common stocks of any one industry are limited to seven per cent of the combined trust funds of each plan.

In addition, investments in stocks of any one company are limited to 2½ per cent of the combined trust funds of each plan.

In respect to voting stock, the limitation is five per cent of the voting stock outstanding of any company.

Q. Do you know what the trustees' purchases of General Motors shares are since the formation of the plans?

A. I have the schedule before me. (Indicating.)

Q. That is the one that you are not sure about, you are in doubt as to whether it is 1958?

A. For 1958, yes, sir.

Q. Well, subject to check of that——

Mr. Tierney: We can do that, I think, probably, if it is agreeable to the Government, by agreement.

[fol. 511] By Mr. Tierney:

Q. Do you know whether the trustees under these combined trusts have purchased their full limit of 2½ per cent of the total funds in General Motors stock?

A. No, sir, they have not.

Q. Have you made a tabulation or had one prepared under your supervision that would disclose those investments?

A. A tabulation has been prepared, yes, sir.

Mr. Tierney: I ask the reporter to mark this General Motors Exhibit No. 3 for identification.

(Whereupon said document was marked General Motors Exhibit No. 3 for identification.)

By Mr. Tierney:

Q. I show you a document marked General Motors Exhibit No. 3 for identification, entitled, "General Motors Non-Contributory Pension Fund, Composition of Investments held as of December 31, 1958."

Have you seen that document before?

A. Yes, sir.

Q. Was that prepared under your supervision and direction?

A. Yes, sir.

Q. Does it accurately disclose what appears on it?

A. It does.

Q. Based upon the books and records of General Motors Corporation?

A. Of the trustees.

Q. Of the trustees?

A. (Indicating affirmative).

Q. Now, Mr. Stanley,—I call your attention now to the column entitled, "Classification of Investments Held."

What appears under that column?

A. The type of investment which has been purchased by the trustees.

Q. By the combined purchase of all the trustees?

A. All the trustees.

[fol. 512] Q. For all pension funds?

A. Combined pension funds, yes.

Q. I notice that you show, "Investments in Preferred Stock, Bank Stocks and Insured Stocks."

A. Yes, sir.

Q. You also give the total of those investments?

A. That is right.

Q. You give the total investments of total fixed interest securities?

A. Correct.

Q. What percentage of the combined funds at book value are invested in the total fixed interest securities?

A. At December 31, 1958 it amounted to 51.2 per cent.

Q. Can you find that percentage under the column entitled, "Percentage Total"?

A. Yes, sir.

Q. What were the total investments in common stocks, other than preferred stocks, bank stocks and insured stocks?

A. $276,166,000.

Q. And that is at book value?

A. At book value, at cost.

Q. And that reaches a percentage of 35.6, correct?

A. Correct.

Q. What do the total investments at book value by the combined pension trusts in General Motors stock show?

A. They amounted to $5,330,000 at book value.

Q. And what percentage of the total funds at book value have been invested in General Motors stock by the pension trust?

A. 0.68. Less than one per cent.

Mr. Tierney: I will offer in evidence Exhibit No. 3.

Mr. Metzger: No objection.

The Court: It is admitted.

(Said exhibit, so offered and received in evidence was marked General Motors Exhibit 3.)

Mr. Tierney: There is one other document that I have [fol. 513] here, which I would like to have marked General Motors Exhibit 4, for identification.

(Thereupon said document was marked General Motors Exhibit 4, for identification.)

By Mr. Tierney:

Q. I show you General Motors Exhibit 4, for identification. Are you familiar with that?

A. Yes sir.

Q. Does that come from the records of General Motors Corporation?

A. Yes, sir.

Q. This purports to be an extract from the minutes of November 6, 1950, of the Financial Policy Committee, is that correct?

A. Correct.

Q. At the time you assumed your duties and these trusts were in force, was this one of the documents that you had in your possession?

A. No, sir, it was not in my possession.

Q. Did you take that into your possession after you assumed your duties?

A. That is right.

Mr. Tierney: We offer in evidence General Motors Exhibit No. 4.

Mr. Metzger: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked General Motors Exhibit 4.)

Mr. Tierney: I believe that is all.

Redirect examination.

By Mr. Metzger:

Q. Mr. Stanley, in your function as Co-Ordinator of the Trustees of General Motors Non-Contributory Pension Fund, have you had occasion to examine the pension port- [fol. 514] folios of other pension funds?

A. I have, on certain occasions.

Q. Have you on those occasions examined the funds of those pension funds that are presently applied to General Motors stock in that portfolio?

A. No, not particularly.

Q. Have you noted that fact?

A. Well, I have noted that there was General Motors in some of them, and possibly not in others.

Q. In those funds, sir, which you noted, and in which you noted General Motors stock, did you note the percentage of such funds which were committed to General Motors stock?

A. No, I didn't make any such calculation.

Q. Mr. Stanley, is there anything in your instructions as Coordinator of the trustees of the General Motors Non-Contributory Pension Fund which would forbid the trustees acquisition of sufficient stock in General Motors to raise the present holdings from $5,330,000, to 5 per cent of the outstanding stock of General Motors?

Mr. Tierney: I object to that, your Honor, because the document, the trust instruments—the discretion as to what purchases will be made depends upon the will of the trustee.

The Court: Sustained.

Mr. Metzger: If the Court please, I did not ask the witness what was in the trust instrument; I asked the witness was there anything in his instructions as Coordinator.

The Court: From the trustees?

Mr. Metzger: No, in his instructions from the company, as Coordinator.

[fol. 515] As far as the trust instruments are concerned, sir, there is no indication of limitation.

I am now asking the witness whether there is any limitation imposed upon him as Coordinator by the company.

Mr. Tierney: If the Court please, General Motors doesn't buy any of these stocks; these funds belong to the trustees for the benefit of the employees. General Motors hasn't anything to say as to that. It is within their sole discretion.

Mr. Metzger: I believe, to quote Mr. Tierney, himself, on that, the question I am asking the witness doesn't really relate to the objection raised.

The Court: All right, he may answer.

The Witness: Would you repeat the question?

Mr. Metzger: I will repeat the question.

By Mr. Metzger:

Q. Is there anything in your instructions from the company as Coordinator of the trustees that would preclude the trustees' acquisition of General Motors stock sufficient to raise the total portfolio holdings to five per cent of the outstanding stock of General Motors?

A. I have no instructions from the corporation in regard to what the trustees may or may not purchase in the way of General Motors stock.

Q. Then you know of no reason why that may not be done?

A. That would be in the sole discretion of the trustees.

Q. You know of no reason why that may not be done?

Mr. Tierney: I believe he has answered the question.

[fol. 516] By the Witness:

A. (Continuing)—that limitation of any one stock?

By Mr. Metzger:

Q. Up to five percent.

A. Yes.

Mr. Tierney: It isn't up to 5 per cent; it is up to 2½ per cent, of any one company, if it is to be accurate.

Is that correct?

The Witness: That is correct.

By Mr. Metzger:

Q. I call your attention, Mr. Stanley, to Government Exhibit 94, page 3, the first full paragraph.

Would you read the last line of that paragraph, sir?

A. Do you want me to read the whole sentence?

Q. Just the last line.

A. Page 3, the first full paragraph?

Q. The last line.

A. (Reading): "Company to not exceed 5 per cent of such company's voting stock."

Q. Would you care to review your last statement in response to Mr. Tierney's question, sir?

A. No. My answer was correct; that as far as the stock, any one company is limited to 2½ per cent of the total funds. As far as investments in the voting stocks of any company, that is an entirely different matter; that is limited.

Q. You are referring, I believe, sir, to the statement on page 2, the second full paragraph, and I quote:

> "In addition, it appears desirable to limit the investments in stock of any one company to 2½ per cent of the combined trust funds for each plan"?

A. Right.

Q. Well, that limitation is as to the amount of money [fol. 517] in each plan which may be committed to the stock of any one company, is that right?

A. That is correct.

Q. But that has no limitation upon the amount of money which may be committed to the voting stock of any company, has it?

A. The limitation on the voting stock is the per cent of the total voting stock, number of shares outstanding.

Q. Then I repeat, sir, do you know of any reason why these Trustees may not buy up to 5 per cent of the outstanding voting stock?

Mr. Tierney: I object to that.

I would like to ask Counsel for Government a question. Are you proposing to ask this Court to order these Trustees under these Pension Trusts to do something with this General Motors stock?

Mr. Metzger: Sir——

Mr. Tierney: Answer the question, please.

Mr. Metzger: What the Government proposes will be brought out at the conclusion of this hearing.

Mr. Tierney: If the Court please, I object to this line of testimony as irrelevant and immaterial.

Mr. Metzger: Your Honor, this line of testimony deals with one source for General Motors stock, which has been brought into issue by the defendants as to the marketability thereof.

Mr. Terney: If your Honor please, it is already apparent that this is no source, because of the fact that these trustees must invest these funds exclusively for the benefit of the employees; and General Motors cannot determine—it doesn't hold the fund, and it can't make the purchase. These funds [fol. 518] must be invested; otherwise the whole pension fund will lose its whole purpose.

Mr. Metzger: Would you explain the purpose of this last statement, sir?

Mr. Tierney: The purpose of it is to try and get you on the right line, so that you understand what this is about. Do you understand that?

Mr. Metzger: I think I am getting a vague glimmer, sir. Could I ask you just this one question, sir?

Mr. Tierney: You could, but I don't know whether I will answer it.

Mr. Metzger: Does it devolve upon the right of the trustee to permit this stock to the employees of General Motors Company as its particular investment in any one company?

Mr. Tierney: I don't understand the question. I can't answer it.

Mr. Metzger: No further questions of the witness, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Reycraft: The Government calls on Mr. Emerson.

Sumner B. Emerson, a witness having been previously duly sworn, was examined and testified further as follows:

Direct Examination—(Continued.)

By Mr. Reycraft:

Q. Mr. Emerson, when we closed Friday, we were referring to Government's Exhibit 93 for identification?

A. Yes, sir.

[fol. 519] Q. I believe that you testified that the document was prepared by Mr. Hudson B. Lemkau, is that correct?

A. That is correct.

Q. And your testimony also covered other aspects of this document?

A. Yes, sir.

Mr. Reycraft: I offer Government's Exhibit No. 93 in evidence.

Mr. Cox: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 93.)

Mr. Reycraft: Will the reporter please mark this for identification as Government's Exhibit 96; a document which bears the numbers in the lower left hand corner, 57, 58, 59, 60 and 61, entitled, "General Motors Corporation Common Stock"?

(Thereupon said document was marked Government Exhibit 96 for identification.)

Mr. Cox: There are five pages to that document, are there not?

Mr. Reycraft. Yes, sir.

By Mr. Reycraft:

Q. Mr. Emerson, I have handed you Government Exhibit No. 96. Will you describe that document, please?

A. This is a list of the underwriters in the so-called Sloan secondary offering of General Motors, showing the number of shares that each firm underwrote, the percentage of the entire issue that each underwrote, the amount that each retained for his own retail sales, the amount that the manager sold for the account of each underwriter to other dealers, and the amount that each underwriter pur-

[fol. 520] chased themselves as a dealer, which would be over and above their underwriting commitment.

Q. Is this a document which was prepared by your firm in connection with the Sloan secondary?

A. Yes, sir.

Mr. Reycraft: I offer Government Exhibit 96.

Mr. Cox: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit No. 96.)

Mr. Reycraft: I refer next to the document entitled "Analysis of Distribution of 1,278,833 shares of General Motors Corporation common stock."

Will you mark this document as Government Exhibit 97 for identification?

(Whereupon said document was marked Government Exhibit No. 97 for identification.)

Mr. Reycraft: This bears the number 215.

By Mr. Reycraft:

Q. Will you describe this document, Mr. Emerson?

A. This is an analysis of the distribution of 1,278,833 shares of General Motors common, which were offered April 30, 1956; it shows its distribution geographically and by type of buyer.

Q. Mr. Emerson, referring to the lower right-hand corner of this document, on the line which begins with the word "Total," will you state the total number of shares which were sold in this offering?

A. 1,302,457.

Q. Is this a greater number than the number actually offered for sale by the Sloan Foundation?

A. Yes, sir.

[fol. 521] Q. Which indicates that the issue was oversold, does it not?

A. It indicates that we had a short position.

From the point of view of the syndicate, it was oversold. That figure does not necessarily mean it was oversold retail.

Q. As far as the underwriters were concerned, in other words, there were more purchases than the Sloan Foundation had stock to offer, is that correct?

A. That is correct.

Mr. Reycraft: I offer Government Exhibit 97 into evidence.

Mr. Cox: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit No. 97.)

Mr. Reycraft: I will refer next to the document which bears the number 375 in the lower left-hand corner, which is a handwritten list of transactions of General Motors Corporation common stock in the Sloan offering.

Will you mark this as Government Exhibit 98 for identification?

(Whereupon said document was marked Government Exhibit 98 for identification.)

By Mr. Reycraft:

Q. I hand you Government Exhibit 98, Mr. Emerson. Will you describe this document?

A. It is a day-by-day report of the volume of General Motors Corporation common stock—I assume this is on [fol. 522] the New York Stock Exchange, but it doesn't so indicate—the high price, the low price, and the last price of each day.

Q. Who is Hugh Beatty, Mr. Emerson? His name appears in the upper right-hand corner.

A. He is an employee of Morgan Stanley & Company in our Stock Department.

Q. Does this indicate that Mr. Beatty prepared this document?

A. Yes, sir.

Mr. Reycraft: I offer Government Exhibit No. 98.

Mr. Cox: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 98.)

Mr. Reycraft: Does the Court have this set of documents?

The Court: Yes, I have.

Mr. Reycraft: I refer next to the document which bears the number 8 in the lower left-hand corner, and has the date January 18, 1957. It says Government Exhibit 2 at the bottom. That was marked at the deposition of Mr. Emerson.

Will you mark this as Government Exhibit 99 for identification?

(Thereupon said document was marked Government Exhibit 99, for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, I hand you Government Exhibit No. 99. Will you describe that document?

Mr. Bushby: If your Honor please, this is another of a series of documents that have been excluded right along, [fol. 523] a list of underwritings taken from Blyth's files or

Morgan Stanley's files of other underwriters. You have excluded that right along.

Mr. Reycraft: I intend to discuss that issue, your Honor.

Mr. Bushby: I thought it had already been concluded by the Court.

Mr. Reycraft: It has been concluded by the Court that these documents are not admissible to prove the facts stated on their face. Is that correct? I believe that was your Honor's ruling.

The Court: State your question, and the Court will rule.

By Mr. Reycraft:

Q. Mr. Emerson, are you able to say which issue this document was prepared in connection with?

A. No, sir.

Mr. Reycraft: Perhaps we can find that later. I will reserve this document until we do.

The Witness: I can guess, but I am not certain.

Mr. Reycraft: Let's find out for sure.

I will refer next to a document which bears the numbers 897 and 898, was marked Government Exhibit 3, for identification, at Mr. Emerson's deposition.

Will you mark this as Government Exhibit 100, for identification?

(Thereupon said document was marked Government Exhibit 100, for identification.)

By Mr. Reycraft:

Q. I hand you Government Exhibit No. 100. Will you describe that document?

A. This is a memorandum dated January 27, 1955, dealing with the mechanical problem of publicity in connection with whether or not the du Pont Company was going to exercise its rights for General Motors stock.

[fol. 524]

Q. Mr. Emerson, the initials JMY appear on the bottom of the last page. Can you identify JMY?

A. Yes, sir—John M. Young, a partner of our firm.

Mr. Reycraft: I offer Government Exhibit 100 into evidence.

Mr. Cox: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 100.)

Mr. Reycraft: I refer next to a document which bears the number 911 in the lower left hand corner and was marked Government Exhibit 4 at Mr. Emerson's deposition.

Will you mark this as Government Exhibit No. 101 for identification, please?

(Thereupon said document was marked Government Exhibit No. 101 for identification.)

By Mr. Reycraft:

Q. I hand you Government Exhibit No. 101. Will you read that document, Mr. Emerson?

A. Do you want me to read it aloud?

Q. Yes, sir, if you don't mind.

A. This is a memorandum addressed to Mr. H. S. Morgan, dated February 7, 1955, which reads:

> "In talking to underwriters or to anyone else, we are not to mention the price limit of 90, which is contained in the du Pont resolution relating to the latter's subscription to General Motors stock."

[fol. 52] Q. Can you identify F.T.W., Mr. Emerson?

A. Yes, sir.

Q. Who is he?

A. Francis T. Ward, a partner of our firm.

Q. Do you know if this memorandum was circulated to the partners of your firm at this time?

A. I feel quite sure that it was. There were 19 copies made, and that would indicate that it was.

Q. You think, then, that all the partners of your firm knew at this time that duPont would subscribe to the General Motors stock at a price of 90?

A. Well, duPont had before this date announced that it was going to subscribe, that it was going to exercise its

rights. But as I remember it, the General Motors Corporation had already announced at that time what the subscription price was going to be; namely 75, so it was never announced to my knowledge anything about 90 in connection with duPont.

Q. It was not announced to the public?

A. That is correct.

Mr. Reycraft: I offer Government Exhibit No. 101.

The Witness: It wasn't known to us until after we knew that duPont was going to exercise its rights.

Mr. Cox: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 101.)

Mr. Reycraft: I will refer next to a document which bears the number 912 in the lower left hand corner.

Will you mark this document as Government Exhibit No. 102 for identification, please?

(Thereupon said document was marked Government Exhibit 102 for identification.)

[fol. 526] By Mr. Reycraft:

Q. I hand you Government Exhibit No. 102, Mr. Emerson. Will you describe this document, please?

A. It is apparently a copy which we received either from the duPont Company or the General Motors Company, I do not know which, of the resolution that was passed by duPont —I don't know whether it is the Finance Committee or the Board of Directors. There is nothing here that indicates who passed it.

Mr. Reycraft: We will receive a copy of that from you, Mr. Cox?

Mr. Cox: Have you asked for it?

Mr. Reycraft: Was that covered by our subpoena?

Mr. Cox: I don't know. We will supply you with a copy.

Mr. Reycraft: I will not offer it at this time.

I will ask that this document be marked Government Exhibit 103 for identification, the document which bears the

number 355 in the lower left-hand corner, and was marked Government Exhibit No. 6 at Mr. Emerson's deposition.

(Thereupon said document was marked Government Exhibit 103 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, are you able to state which issue Government Exhibit No. 103 was prepared in connection with?

A. The only way I could tell would be to look up what issue we were working on at that time.

Mr. Reycraft: All right. We will reserve this until you are ready to do that.

Will you mark for identification as Government Exhibit [fol. 527] No. 104, a document which bears the number 916 in the lower left hand corner.

(Thereupon said document was marked Government Exhibit No. 104 for identification.)

Q. Will you describe that exhibit?

A. It is a list of layoffs of General Motors common stock in connection with their rights offering in 1955. It gives six dates, the earliest being February 9th and the latest February 16th, showing the total amount that had been laid off through underwriters and through dealers on each of those six offerings.

Q. Can you identify R.H.B., Mr. Emerson?

A. Yes, sir; Robert H. Baldwin.

Q. Is he an employee of your firm?

A. He was an employee at that time, yes. He is now a partner.

Mr. Reycraft: I offer Government Exhibit No. 104.

Mr. Cox: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit No. 104.)

By Mr. Reycraft:

Q. I next refer to a document which bears the number 353 in the lower left-hand corner and it was marked Government's Exhibit 8, at Mr. Emerson's deposition.

Mr. Reycraft: Will the reporter mark this as Government's Exhibit 105?

(Whereupon said document was marked Government Exhibit No. 105 for identification.)

[fol. 528] By Mr. Reycraft:

Q. Will you describe Government's Exhibit 105, Mr. Emerson?

A. This shows what the actual underwriting fee was in the General Motors rights offering. Also it shows what it would have been had the dollar amount of that underwriting fee been spread over all of the stock except that to which the duPont Company had agreed to subscribe.

Q. This is a document which came from your files, is it not?

A. Yes, sir.

Mr. Reycraft: I offer Government's Exhibit 105.

Mr. Cox: No objection.

Mr. Bushby: I do not object, but I do not see the possible relevance.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 105.)

Mr. Reycraft: Will the reporter mark for identification Government's Exhibit 106, a document bearing the number 917 in the lower left hand corner?

(Whereupon said document was marked Government Exhibit No. 106, for identification.)

By Mr. Reycraft:

Q. I hand you Government Exhibit 106. Will you describe that document?

A. This was a memorandum prepared, I think, during the course of the General Motors rights offering in 1955 to show the amount of rights that would be issued to some of the largest stockholders of General Motors.

It also shows some of those who had agreed—who already had or were expected to exercise their rights.

[fol. 529] Q. Are those large stockholders as to whom you thought you might have to purchase their rights?

A. Well, this memo was made in the course of the offering. At the time of the memo it shows the amount of rights that we might—not have to purchase, but where we would make a bid and assume we would purchase.

Q. But the document does not indicate that these rights were actually purchased by Morgan Stanley, does it?

A. Well, someone has written in with regard to the first eight items, "M.S.," meaning Morgan Stanley—"bought all but those of Sharp."

Mr. Reycraft: I offer Government's Exhibit 106.

Mr. Cox: May I ask Mr. Emerson a question?

Mr. Reycraft: Yes, you may.

Cross-examination.

By Mr. Cox:

Q. Mr. Emerson, those figures at the right-hand column are not intended to indicate numbers of rights, are they, but, rather, the number of shares?

A. They would be the same. As I understand it, these are the number of shares then held. I am sure it is true in the case of du Pont. They then held twenty million shares of du Pont; therefore, they would receive twenty million rights, one right per share.

Q. One for one?

A. It takes twenty rights—I think it was twenty in that case—to subscribe to one new share; but the rights would be the same as the number of old shares held.

Q. And to find out how many shares each one of these holders is entitled to subscribe to, you divide these figures by twenty?

A. I think it was twenty, but whatever the ratio was——

Mr. Cox: I have no objection.

[fol. 530] The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit 106.)

Direct Examination:—(Continued)

By Mr. Reycraft:

Q. Before we pass on, Mr. Emerson, can you identify the initials H. S. H. which appear in the lower left hand corner?

A. Yes, sir; Herbert S. Hall.

Q. And is he with your firm?

A. He is.

Mr. Reycraft: Will the reporter mark for identification as Government's Exhibit 107 the document which bears the numbers 11, 12, 13, 14 and 15 in the lower left hand corner. This is a five-page document.

(Thereupon said document was marked Government Exhibit 107 for identification.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit, No. 107. Will you describe that document, Mr. Emerson?

A. Well, this memorandum was apparently written early in the negotiations with the officers of the Socony-Mobil Oil Company and was written by one of our partners to whoever else would be working on the issue, I assume, to outline the points to be brought out in negotiation on the matter of the subscription price.

Q. Can you identify F. T. W.?

A. Francis T. Ward, W-a-r-d.

Q. Now, referring to Page 3 of this document——

Mr. Burnham: Page No. 3 or the third page?

Mr. Reycraft: Number 14 in the lower left hand corner, page number 3 at the top.

[fol. 531] By Mr. Reycraft:

Q. (Continuing) Will you read the sentence which begins in the middle of the page, "The General Motors experience——

A. (Reading) "The General Motors experience where the subscription price was 25 per cent below the market was concrete demonstration that there was no stigma attached to a generous (low) subscription price."

Q. Do you have any understanding of what this sentence means?

A. Yes; sometimes where a very low subscription price is set it might be because of a feeling that that was the only subscription price that could be set and still have stockholders exercise their rights.

That was not true in the case of General Motors.

Mr. Reycraft: I offer Government's Exhibit 107.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 107.)

By Mr. Reycraft:

Q. I will refer next——

Mr. Cox: Are you finished with this document?

Mr. Reycraft: Yes.

Cross-examination.

By Mr. Cox:

Q. Mr. Emerson, in reference to the memorandum headed, "Memorandum for Preliminary Conference with Socony-Mobil Oil Company, Re Subscription Price" to which you have just testified, was that Socony-Mobil Oil issue a rights offering or a secondary offering?

A. It was a rights offering.

[fol. 532] Q. Do you understand the sentence to which Mr. Reycraft directed your attention on Page 3 to be a sentence that is directed to a rights offering as distinguished from a secondary offering?

A. Yes, sir, it would be inapplicable on a secondary offering.

Mr. Cox: Thank you.

Direct Examination:—(Continued)

By Mr. Reycraft:

Mr. Reycraft: Would the reporter mark for identification a document which bears on the bottom the identification, "Government's Exhibit No. 11." This was again marked at Mr. Emerson's deposition.

Will you mark it Government's Exhibit 108?

(Whereupon said document was marked Government Exhibit No. 108 for identification.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit 108. Will you describe this document, Mr. Emerson?

A. This is a list of bond issues where Morgan Stanley & Company was the manager or co-manager from January 1, 1950 to November 20, 1958, limited to issues of over one hundred million dollars.

Q. And all of these issues were either managed or co-managed by the Morgan Stanley Company, is that correct?

A. That is correct.

Mr. Reycraft: I offer Government's Exhibit 108.

Mr. Bushby: I do not see any relevance. The witness has given the title to the tabulation, as it appears. He [fol. 533] has just read it. He hasn't said anything about it. It is about a bond issue. We are not dealing with bonds in this case at all.

I see no relevance.

The Court: Will counsel state the relevancy?

Mr. Reycraft: Yes, your Honor. The issue of financing has been raised by General Motors, and I believe we have also shown that there is some identity between the markets for both bonds and common stocks, and in that respect it is relevant.

Mr. Bushby: As I recollect what has happened here in these hearings, I think no claim has been made that General Motors could not finance by bonds.

Mr. Reycraft: I believe the Court has already ruled on this issue.

Mr. Bushby: I think the testimony has been that the bond market is an entirely different thing than the stock market.

The Court: The objection is overruled.

Let us proceed.

(Said document, so offered and received in evidence, was marked Government Exhibit 108.)

Mr. Reycraft: Will the reporter please mark for indentification as Government's Exhibit 109, a document which is identified as Government's Exhibit No. 12 of Mr. Emerson's deposition?

(Thereupon said document was marked Government Exhibit 109 for identification.)

By Mr. Reycraft:

Q. I hand you Government's Exhibit No. 109 for identification. Will you describe that document, Mr. Emerson?

A. It is a list of common stock, preferred stock, and convertible debenture issues, managed or co-managed by our [fol. 534] firm, between January 1, 1950 and November 20, 1958, limited to issues where the dollar amount was over 25 million dollars.

Q. Can you identify Mr. E. T. Brady, whose name appears on this document, as well as on Government's Exhibit 108?

A. Yes, sir.

Q. Who is he, sir?

A. He is an employee of the Morgan Stanley Company, in our Syndicate Department.

Mr. Reycraft: I offer Government's Exhibit No. 109.

Mr. Cox: Mr. Reycraft, I have no objection to this document, so far as its authenticity is concerned, but I think the record should show as to this document and the preceding document that they were not tabulations prepared by Morgan Stanley in the regular course of business; but, as I understand it, the tabulations were prepared under the direction of Morgan Stanley's own counsel for use on Mr. Sumner Emerson's deposition.

I think that is right, isn't it, Mr. Emerson?

The Witness: That is correct.

Mr. Reycraft: I understand that to be accurate.

Q. You are in a position, are you not, Mr. Emerson, to say that these figures are accurate?

A. Yes, sir.

Mr. Bushby: I object to the introduction of this exhibit on the ground that these issues are not in any respect similar to the ones here.

The Court: The objection is overruled. It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 109.)

Mr. Reycraft: I refer next to a document which has the identification Government Exhibit No. 13 of Mr. Emerson's deposition.

[fol. 535] Mark this, please, as Government Exhibit 110, for identification.

(Thereupon said document was marked Government Exhibit 110, for identification.)

By Mr. Reycraft:

Q. Will you describe Government Exhibit 110, for identification, Mr. Emerson?

A. This is a list of stock issues managed by someone other than our firm, but in which we had an underwriting commitment. The dollar amount of the issue was in each case 50 million or more, and the offering dates between January 1, 1950, and November 20, 1958.

Q. And was this also prepared by Mr. Brady in connection with your deposition, Mr. Emerson?

A. Yes, sir.

Q. And do you adopt this as your testimony?

A. Do I what?

Q. Are you able to state that this is accurate?

A. Yes, sir.

Mr. Reycraft: I offer Government Exhibit 110 in evidence.

Mr. Bushby: I object on the same ground that we objected to on the sheets showing Morgan Stanley's participation.

Mr. Emerson testified here last week that all he knew about these issues in which they participated and did not

manage was the fact that there was an issue and what happened to their segment of the offering and what they underwrote; and this doesn't even show what Morgan Stanley underwrote.

Mr. Reycraft: I offer this, your Honor, to show that [fol. 536] Morgan Stanley did participate in these issues, which I think is an apparent fact.

Mr. Bushby: The fact of the business of Morgan Stanley has nothing to do with the issues before this Court.

Mr. Reycraft: Even as to the issues which Morgan Stanley managed, of course, it didn't underwrite the whole issue. This indicates that it did participate in the underwriting of these issues.

The Court: Objection is overruled.

Let us proceed.

(Said document, so offered and received in evidence, was marked Government Exhibit 110.)

Mr. Reycraft: Will the Reporter please mark for identification as Government's Exhibit 111, a document which bears the number "Government Exhibit 14," on the bottom.

This, again, is a document that was marked at Mr. Emerson's deposition.

(Thereupon said document was marked Government Exhibit 111, for identification.)

By Mr. Reycraft:

Q. Will you describe Government's Exhibit 111, Mr. Emerson?

A. This is a list of the bond issues managed by others than Morgan Stanley & Co., in which we had a participation, underwriting participation. The issues in each case total over 100 million dollars and took place between January 1, 1950, and November 20, 1958.

Q. Was this document prepared by a member of your firm, an employee of your firm, in connection with your deposition?

A. Yes, sir. This was also prepared by Mr. Brady.

[fol. 537] Mr. Reycraft: I offer this exhibit to show that Morgan Stanley participated in the issues listed on this paper.

Mr. Bushby: It is immaterial, in my opinion, your Honor.

The Court: You have a standing objection. Proceed.

(Said document, so offered and received in evidence, was marked Government Exhibit 111.)

Mr. Reycraft: I will next refer to the document which bears Government's Exhibit No. 15 on the bottom.

Will you mark this as Government's Exhibit 112 for identification?

(Whereupon said document was marked Government Exhibit No. 112, for identification.)

By Mr. Reycraft:

Q. Will you describe Government's Exhibit No. 112, Mr. Emerson?

A. This is a tabulation of the offerings managed or co-managed by our firm between January 1, 1950, and December 31, 1958, showing the number of offerings and the dollar amounts broken up under the headings, "Stocks," "Bonds."

It also shows similar information for issues not managed by our firm but in which we participated.

Q. And was this also prepared by Mr. Brady in connection with your deposition?

A. Yes, sir.

Mr. Reycraft: I offer this document for the purpose of showing all of the material facts set forth therein with respect to the offerings managed or co-managed by Morgan Stanley Company, and to show that Morgan Stanley participated in the other underwritings as to which the totals are indicated on this document.

The Court: It is admitted.

[fol. 538] (Said document, so offered and received in evidence, was marked Government Exhibit No. 112.)

Mr. Reycraft: Will you mark for identification as Government Exhibit 113, the document which is marked Government Exhibit 16 of Mr. Emerson's deposition?

(Whereupon said document was marked Government Exhibit No. 113, for identification.)

By Mr. Reycraft:

Q. Will you describe Government's Exhibit 113 for identification, Mr. Emerson?

A. It is a resume of the underwriting obligations and liabilities of European firms who participated in the Royal Dutch offering.

Q. Mr. Emerson, does this document indicate, or are you able to testify from your own knowledge, that Morgan Stanley was responsible for all the layoffs in this issue? Will you refer to the bottom of the first page?

A. Well, that says that the European underwriters are excluded from layoff transactions taking place in the United States.

It was my impression that there were some strictly in Europe, but I am not sure of that.

Q. Were those which occurred in Europe under the general supervision of Morgan Stanley, or were they conducted under the authority of Morgan Stanley? Could you explain that?

A. We were the manager of the underwriting; we had a group of Dutch banks who were sub-managers for the European part of the underwriting; and whether that would have been under their supervision or ours, I don't remember.

Q. Will you refer to paragraph 3 of this document, that is, numbered 3, and headed, "Stabilization"?

A. Yes.

Q. And I will read it:

> [fol. 539] "While Morgan Stanley has not employed stabilization in any rights offering since 1952, they are granted the power of stabilizing in Article 3 of the agreement among underwriters. Such transactions will be for the account of the U. S. underwriters alone, and the European underwriters will bear none of the risk or responsibility for such transactions."

Will you explain the basis for the distinction between American and European underwriters in that respect?

A. The European underwriters were not at all familiar with the method of underwriting in the United States. So far as I know, they do not have stabilization transactions

in connection with underwritings in Europe; and they felt that they would be giving Morgan Stanley & Company too much power that might cost them money if the stabilization was not successful, and it seemed simpler to just exclude them from the stabilization transactions and have it for the account of the U. S. underwriters.

Q. Does this stabilization refer only to the market in the United States or does it refer also to the European market?

A. Both, if stabilization transactions took place.

Q. Pardon me, sir?

A. If stabilization transactions took place.

Mr. Reycraft: I offer Government's Exhibit 113.

Mr. Cox: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 113.)

Mr. Reycraft: I will refer next to document marked Government Exhibit 17 at Mr. Emerson's deposition.

Will you mark this as Government Exhibit No. 114, for identification?

[fol. 540] (Thereupon said document was marked Government Exhibit 114, for identification.)

By Mr. Reycraft:

Q. Will you describe Government Exhibit 114, Mr. Emerson?

A. This is an analysis of the sales of Royal Dutch stock geographically and by type of buyer. It would refer to the stock laid off in the United States or to United States underwriters, and I assume it also covers any unsubscribed stock.

Q. Are you able, Mr. Emerson, from this document to derive the number of shares of stock which were sold in foreign countries?

A. Yes, sir.

Q. Will you state that number, please?

A. I would have to add them up.

Q. Are they the numbers which appear in the extreme right-hand column at the bottom?

A. Yes.

Mr. Reycraft: We will compute them later and submit them for the record.

I offer Government Exhibit No. 114.

Mr. Cox: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 114.)

Mr. Reycraft: Will you mark as Government Exhibit No. 115 the document which has on the bottom the identification Government Exhibit 18, and which was also marked at Mr. Emerson's deposition?

(Thereupon said document was marked Government Exhibit 115, for identification.)

By Mr. Reycraft:

Q. Will you describe Government Exhibit 115, Mr. [fol. 541] Emerson?

A. This shows the percentages of five different issues which we had managed that were subscribed by shareholders, including those who bought rights. It wouldn't necessarily have to have been shareholders at the beginning of the offering. The percentage that were laid off and the percentage that were unsubscribed.

Q. Will you identify P. St. Germain, whose name appears in the lower left-hand corner?

A. He is an employee of Morgan Stanley & Company.

Q. Are these issues which were all managed or co-managed by Morgan Stanley?

A. All these issues were managed by Morgan Stanley.

Mr. Reycraft: I offer Government Exhibit No. 115.

Mr. Bushby: Same objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 115.)

Mr. Reycraft: Will you mark for identification as Government Exhibit No. 116, the document which was identified at Mr. Emerson's deposition as Government Exhibit No. 19?

(Thereupon said document was marked Government Exhibit 116, for identification.)

By Mr. Reycraft:

Q. Will you describe Government Exhibit 116, Mr. Emerson?

A. It is a list of institutional holdings of stock of the Royal Dutch Company and of the Shell Transport and Trading Company, as of December 31, 1956.

Q. Can you identify the initials ACVD, which appear on the last page of this document?

A. I think they are the initials of a man named Van Dalen.

[fol. 542] Q. Is he an employee of your firm?

A. He was at that time.

Mr. Reycraft: I offer Government Exhibit No. 116.

Mr. Tierney: If the Court please, I know we have a general objection here, but I would like to know what interest it is to this court or what relation it has to this lawsuit to know about the institutional holdings of Royal Dutch and Shell Transport and Trading.

For example, of what interest is it here as to whether Ministers Missionary Benevolent Board has 2,000 shares of Shell? What has that to do with this? I object. This is going way beyond the issues.

Mr. Reycraft: I believe it was Mr. Cox the other day who raised a question of whether the Government had any prospect of selling General Motors stock abroad, and I think it is certainly relevant, at least, in that respect, to show a good deal of it is held here, and also——

Mr. Bushby: Abroad; sell it abroad?

Mr. Reycraft: Pardon me?

Mr. Bushby: These are all domestic institutions.

Mr. Reycraft: That is exactly the point. I offer Government Exhibit 116.

Mr. Tierney: I renew my objection, your Honor.

The Court: I don't think this is relevant. I will sustain the objection.

Mr. Reycraft: Will you mark for identification as Government Exhibit No. 117, the document marked Government Exhibit No. 20 at Mr. Emerson's deposition?

(Thereupon said document was marked Government Exhibit 117 for identification.)

[fol. 543] By Mr. Reycraft:

Q. Will you describe Government Exhibit No. 117, Mr. Emerson?

A. This is a tabulation that is made up and kept up to date during the process of a rights offering to show the progress of the offering, how much of it has already been subscribed.

Q. Is this a document which was prepared by your firm, Mr. Emerson?

A. Well, the tabulation is prepared by our firm, but the information would be submitted to us by the subscription agents, and they were located in six countries.

Q. It was prepared for your firm's use for the purpose——

A. We collated the information that they sent in daily and put it in this tabulation.

Q. For the purpose of acquainting your firm with the facts relating to this issue, is that correct?

A. Partly that and partly because underwriters want to know at times how much of the issue has been already subscribed so that they can cut down their underwriting liability by that amount, and under the formula of the S. E. C. and the New York Stock Exchange, they can then underwrite that much more in other issues.

Q. Is this part of your business records?

A. Yes, sir.

Mr. Reycraft: I offer Government Exhibit 117 into evidence.

Mr. Cox: Before you leave that, I would like to ask the witness some questions about that. I don't understand it.

The Court: You may.

[fol. 544] Cross-examination.

By Mr. Cox:

Q. Mr. Emerson, directing your attention to Government Exhibit No. 117, am I correct that starting at the foot of the left-hand side, starting with the totals shown under United States, moving on to the Netherlands, France, Great Britain, Switzerland and Belgium, those are totals which show the amount of the subscription to the offering in each of those countries? Is that what they show?

A. The subscriptions that were handled with the subscription agents in those respective countries, yes.

Q. Then moving on to the day's total, is that the total number of subscriptions that had been received by the end of business on February 13, 1958? Is that what it means? Or what is the date? As of what date was this compiled, if you can tell?

A. It is dated February 13th and it is a final report. The rights had already expired. They expired February 10th. Your question is the total of 6,868,000 odd——

Q. 208, yes.

A. That is the amount that was subscribed by holders of rights other than the underwriting group, and then, you see, there is an asterisk, which says that it excludes 718,000 odd shares that were purchased by Morgan Stanley through the exercise of rights.

Q. Those would be the laid-off shares, is that right, referred to in the footnote?

A. The 718,000 would be laid off, yes.

Q. Now, excluding that mount of laid-off shares, would you then determine how much or what part of the shares that were subscribed to by others, by the exercise of rights, were subscribed to in each of these countries by applying [fol. 545] those separate figures to the total shown under cumulative total?

Is that the way that could be done?

I will withdrawn that question, I think.

A. I didn't understand the question.

Q. Let me ask you this question:

If I wanted to find out what part of the 6,868,208 shares shown under cumulative total were subscribed to in the countries of the Netherlands, France, Great Britain, Switzerland and Belgium, would this table show that fact?

A. Yes, sir. It shows that 2,083,000 were subscribed in the United States. Therefore, the balance, which would be over four million, would have been subscribed abroad, 4,800,000, roughly.

Q. That is the balance of the 6,868,208?

A. Yes, sir.

Q. Is there anything on this sheet, this table, that would show whether any of the 718,347 shares which are stated to have been purchased by Morgan Stanley & Company

through the exercise of rights, were purchased in foreign countries?

A. Nothing on here shows that at all. A great many of them were.

Mr. Reycraft: May we have the last question and answer?

By Mr. Cox:

Q. A great many of them were, in fact?

A. In fact.

Q. But it does not show on here?

A. It doesn't show on here, and I don't know what the percentage was.

Mr. Cox: The question, Mr. Reycraft, was whether there was anything on this table that shows what part of the 718,347 shares stated in the footnote to have been purchased by Morgan Stanley were purchased abroad.

[fol. 546] The Witness: The stock was purchased in this country, Mr. Cox, but the rights to purchase that stock were, in many cases, bought abroad.

Mr. Cox: I was asking about the rights.

The Witness: Yes.

Direct Examination:—(Continued)

Mr. Reycraft: I offer Government's Exhibit 117.

Mr. Cox: No objection.

The Court: It is admitted.

(Said exhibit, so offered and received in evidence was marked Government's Exhibit No. 117.)

Mr. Reycraft: I refer next to a document which bears the number 158, a four-page document, which goes to the number 161 in the lower left-hand corner.

Mr. Burnham: Which list is this from?

Mr. Reycraft: Your Honor, this document appears in the book and follows the last one we left off with.

The Court: What number?

Mr. Reycraft: 158 in the lower left-hand corner, "Standard Oil Company, $139,647,200.00 September 17, 1952."

Will you mark this as Government Exhibit No. 118, for identification, please?

(Thereupon said document was marked Government Exhibit 118, for identification.)

By Mr. Reycraft:

Q. Will you describe Government Exhibit No. 118, Mr. Emerson?

A. This is a memorandum prepared by our Syndicate Department for accounting purposes, showing the pertinent [fol. 547] facts with regard to the offering in September, 1952, of $139,647,200.00 Standard Oil Company of Indiana, 30-year, 3⅛ per cent debentures.

Q. Are these convertible, Mr. Emerson?

A. They were convertible on or prior to October 1st, 1957.

Q. Did your firm manage this issue?

A. Yes, sir.

Mr. Reycraft: I offer Government Exhibit No. 118.

Mr. Bushby: Same objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 118.)

Mr. Burnham: Your Honor, it is understood, is it not, that our standing objection of the other day is still standing?

The Court: That is correct.

Mr. Reycraft: Will you mark for identification as Government Exhibit No. 119, the document which bears the numbers 497 to 499, and describes a $200 million Standard Oil Company debenture, September 17, 1958.

(Thereupon said document was marked Government Exhibit 119, for identification.)

By Mr. Reycraft:

Q. Will you describe Government Exhibit 119, Mr. Emerson?

A. This is a memorandum prepared by our Syndicate Department for accounting purposes, covering the offering in September, 1958, of $200 million debentures of the Standard Oil Company of Indiana.

Q. Did your firm manage this issue, Mr. Emerson?

A. Yes, sir.

Mr. Reycraft: I offer Government Exhibit 119 into evidence.

[fol. 548] The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 119.)

Mr. Reycraft: Will you mark for identification as Government Exhibit No. 120, the document which bears the numbers 511, 512, 513, 514, and 515 in the lower left-hand corner, a price record of this $200 million issue of Standard Oil.

(Thereupon said document was marked Government Exhibit 120, for identification.)

By Mr. Reycraft:

Q. Will you describe Government Exhibit 120, Mr. Emerson?

A. It is a tabulation of price quotations for the issue of $200 million Standard Oil Company of Indiana debentures, 4½% commencing on September 17, 1958, at 3:40 p.m., which was the time the registration statement became effective, and going through to October 28, 1958.

Q. Can you identify D. T. Cronin, Mr. Emerson?

A. Mr. Cronin is a member of our Stock Department—rather, of our Bond Department.

Q. Can you describe the significance of the period beginning 9/17/58 and ending 10/28/58?

A. Well, it shows that the first quotation for the bonds was 99⅜ bid; offered at 99¾. The first trade was at 99¾, and then it stayed around that price for a couple of days; then became par bid on September 19, and gradually moved up in price with some backing and filling.

[fol. 549] Q. And how high did it go at the end of this period?

A. At the end of this period it was quoted 103⅞ bid offered at 104⅛.

Mr. Reycraft: I offer Government's Exhibit 120.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 120.)

By Mr. Reycraft:

Q. I refer next to the analysis of distribution of this issue, which bears the number 517 in the lower left hand corner.

Mr. Reycraft: Will the reporter mark this as Government's Exhibit 121 for identification?

(Thereupon said document was marked Government Exhibit 121 for identification.)

By Mr. Reycraft:

Q. (Continuing) Will you describe Government's Exhibit 121, Mr. Emerson?

A. This is an analysis of the retail distribution of the issue of $200 million Standard Oil Company of Indiana 4½ per cent debentures showing the distribution geographically and by type of purchaser.

Q. Was this prepared by someone in your firm?

A. It was tabulated by our firm, but in all of these analyses of distribution, the information is given to us by the underwriters and by the members of the selling group and we simply put it together.

Q. It is part of your business records, is it not, Mr. Emerson?

A. Yes, sir.

Mr. Reycraft: I offer Government's Exhibit 121.

[fol. 550] The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 121.)

Mr. Cox: Are you finished with that exhibit?

Mr. Reycraft: Yes.

Cross-examination.

By Mr. Cox:

Q. Mr. Emerson, permit me to direct your attention to Government's Exhibit 120, which is the price record of this 200 million dollar Standard Oil debenture issue. That was an issue of debentures where the coupon rate was 4½ per cent, was it not?

A. Yes, sir.

Q. Can you now remember what the conditions, the general conditions were in the bond market during the period of time covered by this price record?

A. This was the last of three very large—unusually large bond issues. The first one, as I remember it, was 150 million debentures of Standard Oil Company of California.

The second was 350 million debentures of Sears Roebuck and the third, this issue, 200 million debentures of Standard Oil Company of Indiana.

They all came substantially at the same time. There may have been a difference of two weeks between the first one and the last one, but the bond market was under tremendous pressure. I do not think I remember ever having seen three issues in sequence like this before in this size.

When the distribution of the Standard Oil Company of Indiana had been completed, inasmuch as there were no [fol. 551]. very large issues then hanging over the market, the whole market rose.

Q. Do you remember with sufficient precision to tell us about when that happened in terms of this price chart?

A. It started right after the completion of the Indiana issue.

Q. What date on this chart would mark the completion of the Indiana issue?

A. It does not say and I do not remember what the offering price was. It is not given here. I do not remember whether these first quotations are at premium above the offering price or a discount from it.

Q. Mr. Reycraft suggests that the offering price was 99; would that assist you at all?

A. That is what I would have guessed. I think that is correct.

Q. Well, does that enable you to indicate in terms of this price chart when the bond market in your judgment ceased to be under the pressure you have described?

A. Immediately.

Q. Immediately?

A. (Witness nodding head.)

Q. So that would have been sometime between the first two dates shown on the first page of this price chart, is that what you mean?

A. I mean that with a bond issue like this underwriters are out getting indications of interest from the time the issue first goes into registration, and they apparently had sufficient indications of interest where, when the price was set on September 17, 1958, enough of those people were willing to go ahead with their indications, being satisfied with the price, so that the issue was, as I say, all sold.

There were more buy orders than there were bonds, although there may have been some isolated cases where underwriters did not have their bonds spoken for.

[fol. 552] Q. Based on your experience, Mr. Emerson, does this price chart provide any indication from which you could express an opinion for us as to what the course of the market would have been if, instead of being two hundred million dollars of four and a half per cent debentures, which were being sold by the Standard Oil Company, it had been a two hundred million dollar issue of its common stock?

Mr. Reycraft: I object.

Mr. Cox: What grounds? You asked about price.

The Court: Overruled.

By the Witness:

A. Well, then you would have been speaking about stock prices and not bond prices.

By Mr. Cox:

Q. Right.

A. They have utterly nothing to do with each other or substantially nothing to do with each other.

Q. Would you have expected stock prices to follow the same course of movement that the bond prices followed, as shown on this chart?

A. After the distribution—had this been an offer of two hundred million dollars of Standard Oil Company common stock, if I understand your question correctly—if the issue was successful and if there were no changes in the general market, there should be a tendency to rally somewhat once the pressure of the offering was out of the way.

Mr. Cox: Thank you. That is all.

[fol. 553] Direct Examination—(Continued)

By Mr. Reycraft:

Q. Mr. Emerson, do you have Government's Exhibit 119 with you?

A. Here it is (indicating).

Q. Referring to Government's Exhibit 119, would you indicate what the offering date was?

A. This memorandum says September 18th, 1958.

Q. And can you state when these subscription books were closed?

A. Well, I was going to say that the offering started the previous day because the registration statement became effective the previous day. The date of the prospectus is September 17.

Q. Can you say when the subscription books were closed? Refer to the bottom of the page.

A. 11:45 on September 18th.

Q. Now, I believe you testified that during this period there were large amounts of bonds being offered, and did you give the total amount, sir?

A. I mentioned three very large issues, yes.

Q. Would you repeat those?

A. 150 million Standard Oil Company of California; 350 million Sears Roebuck; 200 million Standard Oil Company of Indiana.

Mr. Reycraft: Will you mark for identification as Government's Exhibit 122 the document which bears the numbers 183 through 185 in the lower left hand corner?

(Thereupon said document was marked Government Exhibit 122 for identification.)

[fol. 554] By Mr. Reycraft:

Q. Will you describe Government's Exhibit 122, Mr. Emerson?

A. This is a memorandum made by our Syndicate Department for accounting purposes, showing the pertinent facts relating to the offering of 300 million General Electric Company, 3½ per cent debentures, in May, 1956.

Q. Did your firm co-manage this issue?

A. Yes, sir.

Q. And what was the offering date?

A. The date of the prospectus is May 14th; the offering date is May 15th, but I should say that I think by "offering dates" here, they mean the date of the advertisement.

Q. And you were actually taking orders before that date?

A. You could take orders just as soon as the registration statement became effective, which apparently was on May 14th.

Q. Could you make a sale at that time?

A. Oh, yes.

Q. And can you say when the subscription books were closed?

A. 12.12 p.m., on May 15, 1956.

Q. And what was the offering price of this issue?

A. Par and one-half—100 and a half.

Mr. Reycraft: I offer Government's Exhibit 122.

Mr. Bushby: Same objection.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 122.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit No. 123 a four-page document beginning with the numbers 262 and ending with 265?

(Thereupon said document was marked Government Exhibit 123 for identification.)

[fol. 555] Mr. Reycraft: I will reserve that exhibit until counsel have copies.

Will the reporter please mark as Government's Exhibit 124 a document which bears the number 199 in the lower

left hand corner and is headed, "Analysis of Distribution of 300 Million Dollar General Electric Company."

(Thereupon said document was marked Government Exhibit 124 for identification.)

By Mr. Reycraft:

Q. Will you describe Government's Exhibit 124 for identification?

A. This is an analysis of the distribution of 300 million General Electric Company 3½ per cent debentures, geographically and by type of buyer.

Q. Was this prepared by your firm?

A The tabulation was prepared by our firm.

Q. On the same conditions as the other tabulations which you described?

A. Yes, sir.

Mr. Reycraft: I offer Government's Exhibit 124.

The Court: It is received.

(Said document, so offered and received in evidence was marked Government Exhibit 124.)

Mr. Reycraft: I refer next to a document which relates to the issue of 1,145.011 shares of North American Aviation capital stock. The date of the prospectus was September 7, 1956.

This was referred to earlier.

Mr. Burnham: My records indicate that it was marked as Government's Exhibit 7 for identification, Mr. Reycraft. [fol. 556] Mr. Reycraft: All right. We will then refer to it as Government's Exhibit 7 for identification.)

(Thereupon said document was re-marked Government's Exhibit 7 for identification.)

By Mr. Reycraft:

Q. Will you refer to Government's Exhibit 7 for identification, Mr. Emerson, and describe it?

A. It is a memorandum prepared by our Syndicate Department, for accounting purposes, showing the pertinent information with regard to the offering of 1,145,011 shares of North American Aviation, Inc.

Q. Was this issue managed by your firm?
A. It was.

Mr. Reycraft: I offer Government's Exhibit No. 7.
The Court: It is admitted.

(Whereupon said document, as offered and received in evidence, was marked Government's Exhibit No. 7.)

Mr. Reycraft: I refer next to a document which bears the number 480 in the lower left-hand corner, and it is the Final Report on the North American Aviation issue.
Will you mark this as Government's Exhibit 125 for identification?

(Whereupon said document was marked Government's Exhibit No. 125 for identification.)

By Mr. Reycraft:

Q. Will you describe Government's Exhibit 125 for identification, Mr. Emerson?
A. It is a tabulation showing the rights which we purchased in connection with the North American Aviation [fol. 557] issue, amount purchased each day, and the price. It also shows the subscriptions by days, the aggregate of the subscriptions, plus the stock laid off, price range of the rights and of the stock.
Q. Is this document part of your business records, Mr. Emerson?
A. It was prepared in our office.
Q. For your use in connection with this issue?
A. Yes, sir.

Mr. Reycraft: I offer Government's Exhibit 125.
The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 125.)

Mr. Reycraft: I refer next to a document which has the numbers 368 to 370, three hundred million dollars, U. S. Steel.
Will you mark this for identification as Government's Exhibit 126, please?

(Whereupon said document was marked Government's Exhibit 126 for identification.)

By Mr. Reycraft:

Q. Will you describe Government's Exhibit 126 for identification, Mr. Emerson?

A. It is a memorandum prepared by our Syndicate Department, for accounting purposes, showing the pertinent facts covering the offering of three hundred million U. S. Steel Corporation, four per cent debentures, in July, 1958.

Q. What was the date of the prospectus?

A. July 15, 1958.

Q. When were the subscription books closed?

A. At 10:52 a.m., on July 18, 1958.

Q. What was the offering price?

A. 100½.

[fol. 558] Q. Did this document come from your files and was it part of your business records?

A. Yes, sir.

Mr. Reycraft: I offer Government Exhibit 126.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 126.)

Mr. Reycraft: Will you mark for identification Government's Exhibit 127, the document which bears the number 283 in the lower left-hand corner, and contains an estimate of total institutional purchases of this U. S. Steel issue?

Mr. Burnham: I think that is No. 383.

Mr. Reycraft: 383, that is correct.

(Whereupon said document was marked Government's Exhibit 127 for identification.)

By Mr. Reycraft:

Q. Will you describe Government Exhibit 127, for identification, Mr. Emerson?

A. This is a tabulation showing the institutional purchases of the $300 million U. S. Steel Corporation debenture issue to the extent that we knew them; and it shows how much were bought by various type of institutions, and the aggregate is $140 million out of the $300 million.

Q. Was this prepared for the use of your firm in connection with this issue?

A. It was prepared after the issue, and I suppose to satisfy our curiosity.

Q. For the information of members of your firm?

A. Yes, sir.

Q. Was it maintained as part of your business records?

A. Yes.

[fol. 559] Mr. Reycraft: I offer Government's Exhibit 127.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 127.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit 128 the analysis of distribution of $300 million U. S. Steel with the number "392" in the lower left-hand corner.

(Thereupon said document was marked Government Exhibit 128, for identification.)

By Mr. Reycraft:

Q. Will you describe this document, Mr. Emerson?

A. This is an analysis of the retail distribution of the $300 million U. S. Steel Corporation 4 per cent debentures, geographically and by type of purchaser.

Q. Was it prepared by your firm?

A. It was tabulated by our firm, yes, sir.

Mr. Reycraft: I offer Government's Exhibit 128.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 128.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit 129 the analysis of distribution of $225 million U. S. Steel, which bears the number 357?

(Thereupon said document was marked Government Exhibit 129, for identification.)

By Mr. Reycraft:

Q. Will you describe this document, Mr. Emerson?

[fol. 560] A. This is an analysis of the retail distribution of $225 million United States Steel Corporation Serial Debentures, geographically and by type of buyer.

Q. Does the document indicate the offering date?

A. July 29, 1954.

Q. Was this prepared for the use of your firm?

A. It was prepared for the use of the U. S. Steel Corporation, but we tabulated it.

Q. It was prepared on the same basis as the other analyses that were referred to?

A. Yes, sir. They are given to the issuing company.

Mr. Reycraft: I offer Government's Exhibit 129.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 129.)

The Court: The Court will recess now.

(Thereupon a recess was taken in the above-entitled cause until 2:00 o'clock p.m. of the same day, Tuesday, February 24, 1959.)

[fol. 561] Before Hon. Walter J. LaBuy, Tuesday, February 24, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to recess.

Present: Same as before.

The Clerk: Case on trial.

The Court: Counsel may proceed.

Mr. Andrews: If the Court please, we would like to interrupt Mr. Emerson's testimony at this point and put on Mr. Natrella.

The Court: You may.

VITO NATRELLA, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Andrews:

Q. Will you state your name and address, please?

A. My name is Vito Natrella. I reside at 1718 North Hartford Street, Arlington, Virginia.

Q. Will you tell us your present position, please?

A. At the present time I am Chief of the Section of Economic Research and Chief Economist of the Division of Trading Exchanges of the Securities and Exchange Commission.

Q. Would you give us a brief run-down of your experience?

A. I have been employed in the Securities and Exchange Commission for approximately 20 years, during which time I have been engaged in statistical and economic research in the fields of capital markets, business investments, and individual saving.

[fol. 562] Q. How long have you held your present position?

A. I have been Chief of the Section of Economic Research for approximately seven years.

Q. What are your present responsibilities in connection with your position with the Securities and Exchange Commission?

A. The responsibilities of the section of which I am chief are the preparation and publication of regular statistical series in these fields, that is, the fields of capital markets and business investments.

Q. In this connection, how many people do you have under your direct supervision?

A. I have approximately 30 people engaged in this work, for the most part business analysts, economists, and statisticians.

Q. Mr. Natrella, again going back to your background a little, could you tell us if you are a member of any professional societies of any kind?

A. I am a member of the American Statistical Association and of the Conference on Research in Income and Wealth of the National Bureau of Economic Research.

Q. And in addition to the regular reports and studies that have been published of the Securities and Exchange Commission in which you have had direct supervision in their preparation, have you ever published any other materials?

A. Yes, I have published other materials. I have collaborated on a book on individual savings, and I am the author or co-author of numerous articles and papers in the fields of business investment and pension funds.

Q. Could you give us the titles of some of these papers that you have referred to?

A. Yes. There is a paper entitled, "Implications of Pen-
[fol. 563] sion Fund Accumulations" and another article on "Ten Years Experience with Business Anticipatory Data" and "Forecasting Business Investments from Businessmen's Anticipations," and others.

Q. I hand you Government Exhibit No. 33, which has been admitted into evidence in this hearing. Do you recognize that exhibit?

A. Yes, sir, I do.

Q. Will you describe it, please?

A. This exhibit is entitled, "New Corporate Securities Offered For Cash Sale in the United States."

Q. Mr. Natrella, referring to the sub-title of that exhibit, which is Government Exhibit No. 33, would you tell us what is meant by the term "Estimated Gross Proceeds"?

A. This series is produced under my direct supervision and is based on reports and filings with the Securities and Exchange Commission. The term "Estimated Gross Proceeds" is used because the figures come from anticipated, that is, the securities issues filed before the actual issue has been sold, so that the proceeds are estimated at this time by the businessman, by the person filing the issue.

Mr. Andrews: Your Honor, I believe this is the question Mr. Cox asked regarding this exhibit when we introduced it the other day. If Mr. Cox wishes to inquire further as to this exhibit, he can do so at this time.

Mr. Cox: May it please the Court, I think I should prefer to reserve my cross-examination in the case of this witness until his direct is finished.

Mr. Andrews: This exhibit is in evidence. I am not reintroducing it.

Mr. Cox: All right. I will reserve my questioning.

Mr. Andrews: All right.

[fol. 564] I will ask that this document be marked Government Exhibit 130, for identification.

(Thereupon said document was marked Government Exhibit 130, for identification.)

By Mr. Andrews:

Q. I hand you an exhibit marked Government Exhibit 130, for purposes of identification. Do you recognize that exhibit?

A. Yes, sir. It is a table, entitled, "Net Purchase of Corporate Securities by Class of Investor." It was prepared under my direct supervision at the Securities and Exchange Commission.

Q. Mr. Natrella, I hand you Government Exhibit 32, which has been admitted into evidence in this proceeding. Do you recognize that exhibit?

A. Yes, sir. These figures are from Study of Individual Savings, which is a regular quarterly survey of the Securities and Exchange Commission.

Q. How is the exhibit marked Government Exhibit 130, for indentification, related to Government Exhibit 32, which is now in evidence?

A. Exhibit 130 represents or actually gives the derivation and the computations involved in preparing individual savings in the form of corporate securities. After the figures are derived from the table represented on Exhibit 130, they are then included in what is called Exhibit 32, an individual savings in the form of corporate securities.

Q. Mr. Natrella, again referring to the exhibit marked Government Exhibit 130, for identification, will you tell us in your opinion what the significance is of this exhibit, what it shows?

A. Well, this exhibit shows the——

[fol. 565] Mr. Tierney: Just a moment. I intend to interpose an objection to Exhibit 130 when it is offered, and I

object to this witness testifying to its contents at this time.

The Court: I suggest that you argue the objection now.

Mr. Tierney: Very well.

Mr. Andrews: Yes, your Honor.

I now offer Exhibit 130.

Mr. Tierney: We object to this exhibit 130, and prior to that objection, I would like to ask this witness one question.

The Court: You may.

Cross-examination.

By Mr. Tierney:

Q. Will you look at Exhibit 130?

A. Yes, sir.

Q. You see the column on the extreme left which refers to common and preferred stocks?

A. Yes, sir.

Q. You notice the information or the word "foreigners"?

A. Yes, sir.

Q. And "domestic individuals"?

A. Yes.

Q. What is the source of that information, your source?

A. The source of the item labeled foreigners is the foreign transaction report and the statistics of capital movements published by the Department of the Treasury in their treasury bulletin.

Q. Is that information contained under that column with respect to the item "foreigners" and "domestic" required to be filed by statute with the S. E. C.?

A. Excuse me. I was only talking about the items "foreigners" when I said it was published by the Treasury Department.

[fol. 566] Domestic individuals is a completely different item.

Q. Is it based upon information required by statute to be filed with the S. E. C.?

A. The information under domestic individuals or foreigners?

Q. Either one or both.

A. Well, then, it is not information filed with the S. E. C. It is information published elsewhere or derived.

Q. That is right, and it is hearsay as far as you are concerned as to its accuracy? It is not based upon records required under statute to be filed with the S. E. C., right?

A. This is not a question of filing with the S. E. C. This is a statistical——

Q. Will you answer my question, please?

Mr. Andrews: I object to your question, Mr. Tierney. You said is it hearsay as far as the S. E. C.

I think that is a legal question.

Mr. Tierney: I think I can develop this.

By Mr. Tierney:

Q. You have some information here with respect to domestic individuals?

A. Excuse me, sir. Would you like me to explain?

Q. Would you answer my question, please?

A. Yes, sir.

Q. You have some information here with respect to transactions by domestic individuals, is that correct?

A. Yes, sir.

Q. Is the data included in this exhibit No. 130, in the columns under 1951 through 1957, based upon documents or information required to be filed in the S. E. C. office by statute? Yes or no?

A. Well, no, they are not filed information.

[fol. 567] Q. Then they are based upon estimates, your estimates?

A. Yes, sir, they are——

Q. To refresh your recollection, did you not address a communication to Mr. Hansen, The Hon. Victor R. Hansen, signed by Mr. Edward N. Gadsby, to the effect that the information on these tables does not include any confidential data filed with the Commission, and represents estimates prepared by your economic research.

That is a correct statement, isn't it?

A. Yes, sir.

Mr. Tierney: I renew my objection that this contains hearsay and is not based upon documents required by law to be filed with this department.

Mr. Andrews: Your Honor, first of all, I would like to state that the witness testified that the particular data on this exhibit went into our Exhibit 32, which was received into evidence, and, I might say, by way of stipulation by all parties, as far as I am aware.

Mr. Bushby: I objected to it, but it was overruled.

Mr. Tierney: This is pure hearsay, this part.

The Court: Where did you get this information with reference to domestic individuals?

The Witness: To answer that question, I would have to explain how this item is arrived at or derived. It is not an item which has come from one particular source.

The item domestic individuals is estimated as the residual after excluding all kinds of other financial institutions from the total available corporate securities available on the market.

Now, this domestic individuals is arrived at after every other item is prepared, including the total. The total is [fol. 568] a published series by the SEC representing the net change in corporate securities outstanding.

If we subtract from the net change in corporate securities outstanding, the net purchases of corporate pension funds, which we know, of life insurance companies, of investment companies, of banks, of other institutions, and of foreigners, what we have left are domestic individuals. By definition they have to be.

The Court: The objection is overruled.

Direct Examination:—(Continued)

By Mr. Andrews:

Q. Mr. Natrella, I again refer back to the question I asked prior to the objection. In your opinion, what is the significance of this table? Just what does it show? This is Government's Exhibit 130.

Mr. Cox: May it please the Court, I object to the form of that question. It seems to be argumentative.

The Court: The document speaks for itself.

Mr. Cox: Yes.

By Mr. Andrews:

Q. Mr. Natrella, in the course of your duties, and in your present position with Securities and Exchange Commission, have you had any occasion to become familiar with the subject of pension funds?

A. Yes.

Q. In what way?

A. In 1955 the Securities and Exchange Commission initiated a survey of pension funds, and I have been in direct charge of that survey.

Q. Will you describe the type of information which is contained in this Securities and Exchange series which you have described regarding corporate pension funds?

[fol. 569] A. This series is published annually and presents information on the assets and distribution of assets of corporate pension funds and also of increments, disbursements and common stock transactions.

Q. Why did the Securities and Exchange Commission begin this series in 1955?

Mr. Bushby: Oh, I object to that.

The Court: Overruled. He may answer.

By the Witness:

A. The S.E.C. was interested in corporate pension funds in connection with two reasons: 1. Because of the general growing interest in pension funds and the fact that not too much information was available at that time. It was known that pension funds were developing into an important financial institution.

Also in connection with the study of individual saving, which we were already conducting, it was felt that an estimate of corporate pension fund holdings would be essential to make this study more useful.

Q. Mr. Natrella, were you aware of any other studies or development of statistics in the field of pension fund finance other than this Securities and Exchange series?

A. Yes. There had been other studies of some of them of various aspects or segments of pension funds that had been prepared. There was an article in Fortune Magazine and there was one that the Treasury Department was con-

ducting, a study of Government bond holding of pension funds, and I believe there had been others.

[fol. 570] Q. We have been talking generally about pension funds; are there different types of classifications of pension funds?

A. Well, pension funds, there are various kinds. There are private pension funds and there are Government pension funds. The Government funds include funds such as Civil Service and Railroad Retirement and state and local Government funds and also Social Security.

Then in the private funds we have usually two basic kinds. One is the insured fund, that is, which is administered by an insurance company, and the other is a privately administered fund usually by a bank or other trustee.

Q. Could you tell us approximately how large pension funds were as a group taking them as a group in 1957?

A. May I refer to some notes, please?

Mr. Bushby: If your Honor please, unless he is trying to impeach Mr. Johnson—we had all that from another witness, and so unless it is going to be different testimony——

Mr. Andrews: Your Honor, I am just laying this by way of background. I am not going to repeat what Mr. Johnson testified to.

The Court: Very well.

The Witness: May I refer to these?

By Mr. Andrews:

Q. Yes, you may refer to notes.

Now, before you give me that figure, would you tell me what the source is, Mr. Natrella?

A. The source is a release of the Securities and Exchange Commission of June 8, 1958, entitled, "Corporate Pension [fol. 571] Funds, 1957." At the end of 1957 corporate noninsured pension funds amounted to about nineteen billion dollars in assets, whereas, in insured pension funds,—excuse me, I have another table on that?

Insured pension funds amounted to fourteen billion dollars, a total of thirty-three billion dollars in private pension funds.

Q. Mr. Natrella, of these pension funds of various types that you have defined for us, would you tell us which of these is the most significant in terms of purchase of corporate equities or stock.

A. Well, in terms of purchase of corporate equities of these pension funds, the privately administered funds would be.

Q. Of the insured or non-insured, or both?

A. The private pension funds of the non-insured type, that is right.

Q. Mr. Natrella, restricting yourself to these private, non-insured funds, would you describe in a somewhat general way their growth since 1950, either in terms of total assets or whatever you choose?

A. Well, the non-insured funds in 1957 amounted to about nineteen billion dollars. They grew from about five and a half billion dollars at the end of 1950.

Q. What significant changes have you noted in the composition of corporate non-insured pension fund assets in this period 1951 to [illegible] that was covered by the Securities and Exchange series?

A. Well, the developments of these, in 1951, at the end of 1951, corporate non-insured pension funds consisted of about 32 per cent of Government bonds, 45 per cent corporate bonds, and 16 per cent equity securities.

In 1957, the ratios had become 11 per cent for Govern-
[fol. 572] ment bonds, 52 per cent for corporate bonds, and 28 per cent for corporate equities.

Mr. Bushby: Do you mind asking the witness what he means by corporate equities?

The Witness: Common and preferred stock.

Mr. Bushby: That includes preferred stock?

The Witness: Yes, sir.

By the Witness:

A. (Continuing) Now, of that total,——

By Mr. Andrews:

Q. In that regard, just for further clarification, would you tell us what proportion is common stock and what proportion is preferred stock?

A. The total equity securities held at the end of 1957 amounted to 5.4 billion dollars, of which about 600 million was preferred stock.

Q. Referring to the significant changes which you have explained in your previous answer, would you tell us what this means in regard to trends in portfolio investments of pension funds?

Mr. Cox: May it please the Court, would Mr. Andrews make the question more precise? Do you mean a trend in this 6-year period?

Mr. Andrews: Yes, 1951 to 1957.

Mr. Cox: All right.

By the Witness:

A. Well, what we have seen here from 1951 to 1957, the Government bonds have stayed fairly level, that is, the amount of holding has stayed just about the same. Corporate bonds have about tripled in amount from '51 to '57; whereas, common and preferred stock have quintupled. [fol. 573] Mr. Andrews: I might say, your Honor, from here on out I will be referring always to the period 1951 to '57, which was covered by the Securities and Exchange Commission series.

By Mr. Andrews:

Q. Mr. Natrella, how do the holdings of equity securities of pension funds compare with such holdings of other financial institutions, such as investment companies, insurance companies, banks and Government trust funds?

A. Well, the holdings of corporate pension funds of stocks at the end of 1957 had a market value of about 6.6 billion dollars, and this compares with about 12½ billion dollars held by investment companies which are the largest holders of stocks as of that time.

Another large holder were insurance companies other than life, which held about 5 billion dollars of stocks.

Q. All of the figures that you have just given, will you tell us their source?

A. They are figures prepared in connection with our study of the individual savings.

Q. Is that the Securities and Exchange Commission?

A. The Securities and Exchange Commission. It has been published for a previous year in a study called, "Survey of Corporate Pension Funds—1954."

Q. In this seven-year period, 1951 through '57, what amount of corporate equity securities was added to assets by pension funds?

A. During this period corporate pension funds added about 4.3 billion dollars of equity securities to their holdings.

Q. How would this compare with net acquisitions of the next largest purchaser of corporate equity securities? [fol. 574] A. That would be investment companies which purchased net 3.3 billion dollars during this period.

Q. So that would mean that pension funds would be the largest net purchaser of equity securities during this period?

A. Yes.

Q. During this same period, Mr. Natrella, did the Securities and Exchange Commission obtain data as to the issuance of corporate equity securities by U. S. corporations in aggregate in excess of retirement of said securities?

A. Yes; the Securities and Exchange Commission regularly published such a series in a statistical bulletin.

During the period 1951 through '57 corporations issued in excess of retirements about 21 billion dollars of equity securities.

Q. Mr. Natrella, to your knowledge, have there been any studies made as to the probable future growth of pension funds?

A. Yes, sir, there have been.

Q. Would you tell us some of these studies that you are aware of?

A. There have been some.

Deering made rather an extensive study in 1952 or 1953, I believe, and published it as a volume entitled "Industrial Pensions by the Brookings Institution."

Q. Mr. Natrella, have you yourself made any studies as to future growth and financial characteristics of pension funds?

A. Yes, I have.

Q. Has this study and its results been published?

A. The study was published in the 1957 Proceedings of the Business and Economic Statistics Section of the American Statistical Association.

Q. Would you describe this study, please?

A. Well, the study gives an analysis of trends and relationships of pension funds, and also indicates growth possibilities for 1960 and 1965, as well as a distribution of assets.

[fol. 575] Q. Would you tell us what your estimates were for 1960 and 1965 as to the probable total assets of pension funds by both the insured and non-insured?

A. My estimate shows about $26 billion of insured and $51 billion of non-insured pension fund assets in 1965, a total of $77 billion, while I see——

Mr. Bushby: If your Honor please, I object, unless there is some foundation for this. It is just out of thin air.

Mr. Andrews: I am quite willing to go into how he derived these figures.

The Court: Very well, proceed.

Mr. Andrews: I first want him to describe the study.

By the Witness:

A. And my study showed about $47 billion of pension fund assets in 1960, eighteen billion of which were insured and twenty-nine billion in non-insured.

By Mr. Andrews:

Q. Would you tell us, Mr. Natrella, what your study indicated as to the financial characteristics or compositions of pension funds for these two years, 1960 and 1965, that you have been talking about?

A. My study indicated that in 1960 about 30 per cent of the assets—that is, in both 1960 and 1965, about 30 per cent of the assets would be in the form of common and preferred stock, compared with about 27 per cent, I believe, in 1957; and that about 52 per cent of the assets would be in the form of corporate bonds—about the same as in 1957.

Q. And what about U. S. Government securities?

[fol. 576] A. U. S. Government's—the study showed the U. S. Government's would stay about the same level, somewhat more than $2 billion.

Q. Would you now tell us, Mr. Natrella, how you derived these estimates?

A. The estimates were derived on the basis of trends,—on the basis of observed trends and the current statistics on pension funds, and on projections as to employment and coverage in 1960 and 1965.

Mr. Andrews: I have no further questions, your Honor.

Cross-examination.

By Mr. Cox:

Q. Mr. Natrella, I gather from your direct testimony that you must have gone to work for the SEC about 1938, is that correct—or 1939?

A. 1939, I guess, or 1940.

Q. Could you tell me a little bit more about the projections that you have just testified to on direct examination, particularly about any assumptions that you made with respect to the conditions that would exist in the period covered by the projections in the future? Did you make any assumption, for example, about the size of the Federal Debt?

A. No, I didn't make any assumptions as to the Federal Debt.

Did you make any assumption about the amount of Government debt, Federal Government debt, that would be outstanding in the form of bonds, and things of that sort?

A. No, sir.

Q. What assumption did you make about price level?

A. These projections were made on the basis of current price levels, with no assumptions as to future price level. [fol. 577] It was all done, I believe, in 1957 dollars or something of that sort.

Q. You assumed the same price level for the future that it is today?

A. It is not quite that; it is simply making a projection in terms of constant dollars. Let us put it that way—"constant" being the current dollars, 1957—at that stage.

You see, if the price level goes up, the assumption would be that this would be different.

Q. What would happen if the price level went down?

A. Well, we again would not be able to tell. The assumptions—all the computations are done on the assumption of the current price level, and usually most projections are done on the basis of the current price level, as far as others are concerned, such as "National Product" and "National Income," and things of that sort.

Q. Did you make any assumption about gross national product in connection with your projection?

A. I didn't have to make any assumptions on that, because gross national product projections have been made by many other people.

Q. Did you use some of these?

A. I didn't have to use them. I related my things to them.

Q. Who prepared those projections?

A. They have been published by various people. Actually, Gerhardt Colm published one; The Joint Economic Committee published others.

Q. Did you make any assumption about the level of interest rates in the future?

A. No, sir.

Q. Did you assume that they would be as they are today?

A. I did not get into the assumption.

Actually, what it was, was simply using the current picture as their taking-off point.

[fol. 578] Q. Did you make, may I ask, Mr. Natrella, any assumption with respect to what the relationship would be in the future between the return on funded corporate debt, as compared with the return on corporate equities?

A. No, sir.

Q. Did you assume that that would be more or less as it is today, for the purpose of these projections?

A. They actually didn't enter into the projection. The projections were based on assumptions as to employee coverage, related to the contributions of the employer, you see. They were based on coverage, in effect.

Q. Perhaps you can help me in this respect, Mr. Natrella. In deciding what the composition of the assets would be

in the year 1965, did you do that simply by projecting the changes that had taken place in the past period in the composition of those assets into the future?

A. And extending them into the future, under certain conditions of what the total assets of the pension funds would be—of what the total assets would be at that time.

Q. But without regard to the different assumptions that I have been asking you about?

A. That is right.

Q. Mr. Natrella, do you have before you this table that, I believe, was marked Exhibit 130 for identification?

A. Yes, sir.

Q. It is "Net Purchases of Corporate Securities"?

A. Yes, sir.

Q. (Continuing) "By Classes of Investors."

Mr. Natrella, I should like to ask you some questions about that table. Could we start with the lower half of the table, Mr. Natrella, that is headed, "Bonds and Notes"?

A. All right.

[fol. 579] Q. There is a footnote at that heading which says that it includes quasi-Government debt issues for which separate data on holdings are not available.

What kind of quasi-Government debt issues are included?

A. Those are issues which are guaranteed—rather, not guaranteed by the U. S. Government agencies—FHA, Fannie May (FNMA), and things of that sort.

Q. Does it include any debt issues of local governments of that character?

A. Oh, no,—only Federal Government agencies.

Q. Only Federal Government agencies.

Now directing your attention as an example to the figure that is shown under, "Bonds and Notes" for the year 1951, opposite "Corporate Pension Funds," that is 700 million dollars, is it not?

A. Yes, sir.

Q. From what source was that figure obtained?

A. That is from the Securities and Exchange Commission series on corporate pension funds which we publish regularly.

Q. That, I take it, was not the primary source, but a secondary source. What is the primary source?

A. Well, as far as that particular figure is concerned, the S.E.C. is the primary source, because no one else has that figure.

Q. Well, perhaps I didn't make myself clear.

Does the S.E.C. get some reports from corporate pension funds, from which that figure is computed?

A. Yes, sir.

Q. So that they were the basic source?

A. The reports filed with the S.E.C. in connection with this question are used as the basis for this figure.

Q. Are those reports filed on an annual basis?

A. Yes, sir.

[fol. 580] Q. Do those reports have a number or a name?

A. Do you mean does the form have a number?

Q. Yes.

A. It is form R-4, and it is called, "Survey of Corporate Pension Funds", I believe, or something of that sort.

Q. Do you happen to have a copy of that form with you?

A. No, sir.

Q. If it is not in the courtroom, do you happen to have a copy in Chicago with you?

A. There might be a copy available in Chicago.

Q. In the local office?

A. Yes, sir.

Q. Tell me this, Mr. Natrella; perhaps this will suffice: What do those reports show for a particular pension fund, if you know?

I take it they report on an individual basis, is that right?

A. Yes. The company reports for its pension fund or funds on a consolidated basis, as for all its funds, if it has more than one. It lists certain assets, holdings of cash, holdings of Government securities, holdings of corporate securities, holdings of both bonds and stocks; and it also includes a market value, as well as the book value, on this form. That is the first section.

The second section shows a statement on disbursements and receipts, and then a third statement shows purchases and sales of common stocks.

Q. Directing your attention again to this figure for 1951, which is 700 million dollars, or opposite, "Corporate Pension Funds," under, "Bonds and Notes," just how is that figure computed from these reports? Can you tell us that?

A. Well, what we do is, we put together a composite for [fol. 581] all corporate pension funds, from all these reports, and for the end of 1950 we had it; we had it for the end of 1951.

This represents the increase in the holdings of corporate bonds, as derived from those reports.

Q. You get a figure of increase for each corporate fund?

A. No. We get the figure as to holdings. As far as the corporate bonds are concerned, we get a figure as to the holdings at the end of 1950, and the holdings at the end of 1951.

On the basis for each year, we put together the picture for all corporate pension funds, and then take the change as the change in holdings.

Q. Let me see if I understand that.

Let us imagine the corporate pension fund which we will call "X". The report will show that it had bonds and notes in a certain amount at the beginning or at the end of 1950.

A. Right.

Q. And it will show corporate bonds and notes at the end of 1951, is that correct?

A. That is correct.

Q. And you take the difference between those two figures?

A. Yes, sir, except that we don't do it for the individual; we do it for the aggregate—in aggregate.

Q. Don't you have to start by doing it for the individual and putting them all together?

A. We don't derive the change for each one; we just derive the holdings for each one and add them all together; then we subtract and get the change.

What I mean to say is that we take the sum of all pension fund holdings, as you have outlined. It should give the same result.

Q. There is just a difference in what point you add them up, is that correct?

A. Well, that might be, except that there are other things that enter into it.

[fol. 582] For instance, there are funds which came in in 1951 and were not in existence in 1950.

Q. How do you deal with those?

A. Those get added in in 1951, and they were zero in 1950.

Q. Is this $700 million a book value figure or market value figure?

A. The $700 million supposed to measure, well, it represents the change in book value as shown on the books of the pension funds, which would be very close to a transaction value.

Q. That would be close to a cost, I suppose?

A. Close to a cost, yes.

Q. Directing your attention again to these different categories of institutions included under the bonds and notes, life insurance companies, investment companies, banks, State and local government trust funds, would the answers that you have given to me about the $700 million opposite Corporate Pension Funds apply to the figures or the lack of figures, as the case might be, opposite each one of those other institutions, or are there any differences in the figures?

A. You mean as to the way these figures were derived?

Q. Yes.

A. Oh no. Those were derived in a completely different way.

Q. Perhaps you had better tell me how the life insurance figure of $2,900,000,000.00 was derived?

A. By completely different—I mean that they may be based on similar materials, but not gotten through a questionnaire, say.

For instance, on the life insurance companies, we go to the District of Columbia Superintendent of Insurance, and [fol. 583] these life insurance companies file regular reports with the Superintendent.

We use those data to arrive at the holdings or the change in holdings of corporate bonds.

Q. You mean you go to the Superintendent of Insurance of each State?

A. These are on file. These are annual reports on file.

Q. In each State?

A. We don't have to go in each State, because you can get, oh, a very high concentration in any one State, and the District of Columbia is as good as any. They file the same reports.

For instance, Metropolitan Life Insurance Company doing business in the District of Columbia would have to file the same report there that it files in New York.

Q. Let me ask you this question: do you know whether it is a fact that this information is always obtained by examining the files of the Superintendent of Insurance of the District of Columbia? Is that the sole source?

A. No, there are other sources; one source being the Institute of Life Insurance, which publishes estimates—not estimates—they publish totals for holdings of various types of assets.

There is one difficulty, of course. The holdings are usually on the market value basis which, using the change in market value, would not give you a true measure of the transactions, the net transactions, so the reason we have to go to the Superintendent of Documents is that from there we can get information on what the write-ups or write-downs have been.

Q. Now, where do you obtain the information, or in this instance, perhaps, the lack of information with respect to [fol. 584] the investment companies? Is that from a report filed by the SEC?

A. The investment companies' data, in this case it means that they made very small net purchases.

Q. How do you derive that information?

A. Well, let me refer to my notes, please.

Q. Certainly.

A. The investment companies' figures for the years 1951-1953 came from reports to the SEC that were filed with the Securities and Exchange Commission.

Q. That was 1951 through 1953?

A. That is right. From 1954 on, they come from the National Association of Investment Companies.

The figures on bonds, purchases of bonds, come from the National Association of Investment Companies or estimated by them.

Q. For all of the years?

A. For all the years, yes, because the basic data had a total—you see, the data filed with the SEC showed all corporate securities, not just bonds, and it was necessary to get the bond figures from the Association.

Q. Now, where do you derive the figures with respect to banks under bonds and notes?

A. The figures on banks come from the all bank report put out by the Federal Deposit Insurance Corporation.

Q. Does that institution receive reports from the banks?

A. Well, let me explain. That particular report that I have quoted, the all bank report, is put together by three different agencies; the Federal Reserve Board, which receives reports from all member banks of the System; the Treasury Department, which receives reports from all national banks; the Federal Deposit Insurance Corporation, which receives reports from all insured banks; and then the F. D. I. C. collects data from the State Departments of banking in connection with non-insured banks.

[fol. 585] Putting those all together, they come out with an all bank report.

Q. Now, where does the information come from that appears under the heading, "State and Local Government Trust Funds"?

A. That is basically from the census department that has a publication on this area. They receive reports from the various states.

Q. They receive reports on an annual basis from the states?

A. Yes, sir.

Q. Now what institutions are included under the heading, "Other Institutions," if you know, under bonds?

A. Under bonds, that would be basically fraternal benefit societies and savings and loan associations, and also insurance companies other than life, I believe, are in there too.

I believe in the bond category the most important element in that item would be the non-financial corporations —yes, there are also non-financial corporations included in there.

Q. What do you mean by a non-financial corporation?

A. Regular, ordinary——

Q. Commercial?

A. Commercial corporations, industrials, et cetera.

Q. Does that include charitable and religious organizations, too?

A. In our definition charitable and religious organizations are included with domestic individuals. That is what we call non-profit organizations.

Q. That is explained in your footnote number 3, I take it?

A. Yes, sir.

Q. Now, let me direct your attention again, under bonds and notes, the column headed 1951, to the total for institutions, which is $4,200,000,000.

A. Yes, sir.

[fol. 586] Does that figure mean that in this year, on the basis of the process that you have described to us, you have computed that at the end of 1951, those institutions listed above had bought $4,200,000,000 more in bonds and notes than they had sold during that year?

A. Yes, sir.

Q. As I understand, the figure for domestic individuals, that is arrived at basically by subtracting from another total, the total for institutions, is that right?

A. Yes, and foreigners, if any. There are no foreign bond purchases there.

Q. If there should be any errors of exclusion in the figures given for the categories of institutions—I am not suggesting there is—but if there should be, that would tend to inflate the figure for foreigners and domestic individuals, or at least for domestic individuals, wouldn't it?

A. What you mean is, if there is some institution that we have not included in this total—is that what you are referring to?

Q. Yes.

A. It would end up there, yes, sir, the way non-profit institutions end up in there, and that we have defined as including non-profit.

Q. Now, you get a total for both institutions and individuals for 1951 of $4,100,000,000, is that right?

A. Yes, sir.

Q. Where does the total figure for net purchases of bonds and notes come from that you use in deriving the domestic individuals figure?

A. The 4.1 billion?

Q. No. As I understand it——

A. That is the total.

Q. The total?

A. At the bottom of the table.

Q. Where does that figure come from?

A. That comes from a series published by the Securities and Exchange Commission in its statistical bulletin, and [fol. 587] is obtained by taking new issues less retirements and arriving at that figure. It is published regularly.

Q. What is the relationship between that figure and the figure shown on Government Exhibit 33 for bonds and notes?

A. Exhibit 33? I am afraid I don't have that.

Mr. Andrews: Here is a copy.

By Mr. Cox:

Q. You will note there is a figure there in thousands of dollars for bonds and notes, which for the year 1951 is, roughly, 5.7?

A. Yes, sir. This represents offerings of securities, offerings of bonds and notes during this period. To that we have to make certain adjustments. We add to that certain conversions which take place, for instance, conversions of bonds into stocks—I am sorry. That would be a subtraction. But we make certain adjustments to this figure involving, first of all, the big adjustment which is cash retirements. We subtract retirements of bonds and notes during this period from this figure of 5.7.

We also have to subtract any conversions where you have bonds going out of the bond picture, and we would subtract that. We would make certain other adjustments for, well, quasi Government bonds, which have to be added in.

Q. Added into what?

A. To this figure here. This does not include quasi-Governments, this corporate——

Q. Which figure are you talking about?

A. I am talking about Exhibit 33, new corporate securities offered for cash. That does not include quasi-Governments. The other one does. So, therefore, that is added in.

Q. That is added in to the——

A. To the offering figures.

[fol. 588] Q. Let me see if I understand this. You have mentioned some things you add in and some things you subtract?

A. That is right.

Q. You subtract the conversions of bonds to stock, is that right?

A. We subtract any bonds that are converted, right.

Q. And you subtract—I am now talking about subtracting from the figure shown on the table that is Exhibit 33.

A. Yes.

Q. Which I make out to be, roughly, five billion, seven.

A. Five billion, seven.

Q. You subtract from the 5.7 the conversions?

A. Yes, sir.

Q. And the redemptions?

A. Yes, sir.

Q. And then you add to it the quasi Governmental debt issues which are referred to in Footnote 2 on Exhibit 130, is that right?

A. Yes, sir.

Q. Now, is it a result of that process which accounts for the difference between four billion, one hundred million on exhibit 130 and five billion, seven hundred million on exhibit 33?

A. I believe so, yes, sir.

Q. Where do you get the material about the conversions? Where does that come from?

A. Well, that comes from reports to the S.E.C. The corporations regularly report what has been taking place, the change in capitalization.

Q. And from where do you get the material about the redemptions?

A. Material on redemptions, well, there is a variety of sources. One, we get information from the report to the S.E.C. where an issue is called or redeemed. We examine the figures with the S.E.C. We also examine any other in-[fol. 589] formation we pick up in the financial sources and financial press, as to redemptions that have taken place. We will then check on them and add those in to the series on retiremements.

Q. Mr. Natrella, let me direct your attention to the total on this table for the year 1957, the table which is Exhibit 130. That shows total of ten billion, four hundred million dollars, does it?

A. Yes, sir.

Q. Now the same year, 1957, under bonds and notes shown on Government Exhibit 33, you get roughly a ten billion dollar figure, $9,956,869,000?

A. Yes, sir.

Q. Does that indicate to you—how would you explain the difference between those two figures?

A. By the same method, yes, sir.

It probably means that the retirements were less than the additions, or the subtractions were less than the additions.

Q. The two subtractions being the retirements and the redemptions, which were, you think, less in that case than the amount of these quasi-Governmental debt issues?

A. Well, there could be some other additions in there too.

Q. What could those other additions be?

A. Well, I am not familiar with the particular instance here, but in addition to the additions for quasi-Governments, there would be additions for sales of bonds held by public utility companies, perhaps, or where a corporation is selling an issue which it holds as an affiliate and then puts out an issue to the public.

That would enter into the picture there.

I am not saying that this is what took place in 1957, but there are several other possibilities besides the quasi-Governments.

[fol. 590] Q. Do you have any material with you, Mr. Natrella, that would enable us to see what the figures were with respect to conversions and redemptions and these other adjustments that were made to reconcile the totals as shown in Exhibit 130 with those shown in Government Exhibit 33?

A. I have some material but I don't think it would be—it wouldn't show it completely.

One idea, there were only three billion dollars of retirements in 1957, which is comparatively low, but that is the only material I have.

I mean, I just don't have the reconciliation of those two sets of figures here, but we have it back at the office because it is derived directly, going from one to the other.

Q. Well, there were three billions of retirements in 1957, is that right?

A. That is right.

Q. Now that is a figure that you would deduct from the totals shown on Exhibit 33, I take it?

A. Yes.

Q. So if you deducted that from the 1957 figure there for bonds and notes—what did you say the redemptions were, three billion?

A. Three billion, yes, sir.

Q. You would get that figure down, roughly, to six billion?

A. Excuse me a minute. I wanted to check one figure here.

The Court: The court stands recessed for ten minutes.

(A short recess was taken.)

The Court: Proceed, gentlemen.

By Mr. Cox:

Q. Mr. Natrella, I am about to leave the lower half of the table that we have been discussing. If there is anything [fol. 591] more you want to say by way of completing your answer, please do so.

A. No, sir.

Q. Now let me direct your attention then, Mr. Natrella, to the upper half of that table which deals with common and preferred stocks. Are the figures shown there—do they represent book value or cost or market?

A. They represent purchases net of sales. That is what we are trying to measure.

Q. Yes, but how do you measure them?

A. Well, in connection with pension funds we actually get reports on purchases and sales and, therefore, are able to put together figures on net purchases.

Q. What I am trying to find out is whether you use for that purpose a market figure or book figure, or what it is.

A. Well, the purchase figure would be what they actually paid for the stock and the sales figure would be what they actually received for stock that they sold during the current year, so that the net change would be the purchases net of sales on a cash basis, the actual thing.

All of the figures are supposed to be adjusted to that kind of a concept. You do it in different ways, of course, depending on the data that are available.

Q. Do you mean in some cases that you get net figures that have to be adjusted in some way to reflect the cost of the market?

A. Well, as I say, the figures have to be adjusted so that you get a figure which shows a balance sheet figure at the end of the year of the holdings of common stock; if they are market figures you cannot just take the change in the market value of holdings.

That does not represent the net purchases. You cannot use the cost either, because there are other things involved [fol. 592] there that will confuse it. So what we do is see what kind of figures are available, and make the adjustments necessary.

Now, for instance, in life insurance companies, on the balance sheet, they show the stocks valued at what are called convention values, I believe, which are more or less market values. We have to make adjustments to that in order to eliminate the effect of changes in market values.

Q. How do you do that?

A. Well, in the reports as filed—it so happens that in the reports as filed with the District of Columbia and with other States, they have to indicate the write-ups and write-downs in their portfolio; but also in these reports we do not have to depend on that completely, because in the same reports they do show net purchases and net sales, that is, net purchases *or* net sales of securities.

Q. Do you have that kind of a problem with respect to any of the institutions that are listed here except the life insurance companies?

A. Well, even in life insurance companies, as I have explained, we do get the data on purchases and sales from the reports filed. Actually, the investment company data comes from the national association and there we get net purchases.

As far as banks go, what we use is a net change, the net change in holdings adjusted for capital gains or losses.

Q. Does that figure in the upper part of this table mean that each of these years, of from '51 to '57, banks were net purchasers of common and preferred stocks in the amount of $100 million?

A. Approximately. We would round it off to $100 million, yes, sir.

Q. Mr. Natrella, is the total figure for domestic individuals computed in this instance in the same way it was computed in the case of bonds and notes?

A. Yes.

[fol. 593] Q. So that it really rests or is derived by subtracting the institutional total and the foreigners from the over-all total that is shown in the last line?

A. Yes, sir.

Q. Now, what is the relationship between those totals shown on the last line in this table and the totals shown on the table which is Government Exhibit 33 under Preferred and Common Stocks?

A. Oh, the relationship is the same. This refers to offerings and the figures shown on Exhibit 130 refer to net change in outstanding, and the adjustments made consist of subtracting out retirements of preferred stock and adding in additions due to conversions.

That is from bonds into stock, you see. So you have to add in the stock. The largest adjustment, however, is for the sale of shares of open end investment companies. Those are not included in the offerings figures, but do get into the figures for the net change in securities outstanding and stock outstanding.

Q. The sale of shares by investment companies are not included, you say, in the table shown on Government Exhibit 33?

A. That is right.

Q. They are shown under "Investment Companies"—strike that out.

Where would they appear in the table on 130?

A. The sales of shares of investment companies are included in the total at the bottom of the top section and they would be included in domestic individuals because they are the purchasers thereof.

Q. Do you have before you the table which was introduced in evidence as Government Exhibit 32?

A. Yes, sir.

Q. There is a portion of that table that is headed, "Savings Made Through Media Other than Institutional Investors."

A. Yes, sir.

[fol. 594] Q. And under that there is an entry for common and preferred stocks. Let's look at the year 1951.

A. Yes, sir.

Q. Now, what is the relationship between that figure and the figure shown for 1951 on Table 130 under domestic individuals, common and preferred stocks?

A. The figure under common and preferred stocks under media other than institutional of 1.4 billion dollars represents that part of the domestic individual figure shown in Exhibit 130 other than investment companies.

Now, if you add the figure above in the section of Exhibit 32 where it says, "Investment Company Shares" .4 to the 1.4 you get the 1.8, which is shown on Exhibit 130.

Q. I see. The 1.8 for domestic individuals is the only figure on Table 130 that reflects the sale of investment company shares, is that right?

A. Well, no. The total also does.

Q. The total, too?

Oh, yes, I misspoke myself.

A. Yes. Well, let's say this, the domestic individuals include that amount of investment company shares, that is right, and they are included in the total also.

Q. But that figure was derived from the total?

A. Yes, that figure is derived by subtracting the holdings shown above and you get the 1.8.

Q. The institutional net purchases?

A. The institutional, yes, sir.

Q. Mr. Natrella, may I ask you whether the projections that you have made for the future, these statistical computations that you have testified about, are intended, so far as you are concerned, to convey any significance with [fol. 595] respect to the question whether at any time in the future a particular institution will buy the stock of a particular company at a particular price?

A. Well, I do not think that was the intention.

Mr. Bushby: I would like to ask one question.

Cross-examination:—(Continued)

By Mr. Bushby:

Q. Referring to Government's Exhibit 130, it shows on there, in the first half of it, right across, under the caption "Banks," "One hundred million dollars invested in equity securities, except for the year 1954," and then there is two hundred million dollars.

Now, what kind of stock is that, that you have down for being purchased by banks?

A. It could be primarily preferred stock.

Well, that is what it would be, yes.

Q. What banks can buy any kind of stock? Not members of the Federal Reserve System?

A. No.

Q. They can't buy any stock at all?

A. Some banks do.

I will refer to my notes, if you don't mind.

Q. Yes, please do.

A. Well, the figures, as reported by the Federal Deposit Insurance Corporation, show a certain amount of stock held by banks.

Now, in addition to the member banks, there are non-insured banks and non-member banks; and there are also mutual savings banks in here.

Q. Mutual savings banks have bought that much?

A. Mutual savings banks are included in there, too.

Q. Yes, they can buy some stock?

A. Yes.

Mr. Bushby: That is all.

[fol. 596] Redirect examination.

By Mr. Andrews:

Q. Mr. Natrella, in preparing your projections that you testified about for 1960 and 1965, did you take into account areas in which pension funds would probably be expected to expand and also consider areas in which they would not expand?

A. Yes, sir, we did.

Q. In preparing these same projections, Mr. Natrella, did you take into account the expected relative contributions per employee for the years 1960 to 1965?

A. That is what I did, yes, sir.

Q. Did you also take into account whether or not the benefits that will be given to recipients of pension funds will increase or decrease in 1960 or 1965?

A. We made certain adjustments in the projections to reflect a tendency for higher benefits, and also to reflect a tendency towards vesting.

Q. What effect would this have on the amount of total assets that you would expect them to have in 1960 or 1965 —the fact that they would be paying out higher benefits to receivers?

Would this tend to increase the total asset figure or decrease it?

A. Actually, it would tend to increase the benefit payments, but it would also tend to increase the contributions, because they would also have to go along with it.

Q. Mr. Natrella, did you take into account any trends as to vesting provisions being inserted in pension funds in these future years?

A. To some extent, yes.

Q. Would you tell us what a "vesting provision" is?

A. Where, after a certain number of years, the individual or the employee has certain rights to the funds in the pension funds rather than—so that after a certain num-
[fol. 597] ber of years, if he leaves he might withdraw his equity in the fund, or at least his own contributions.

Q. Mr. Natrella, why didn't you take into account what the national debt would be in 1960 or 1965, or what future interest rates would be at this time?

A. Well, we had in mind only the current situation and did not go into what might be the case as far as the public debt concerned.

We just didn't know.

Q. Was that the reason that you couldn't make a reasonable estimate as to what it would be at that time?

A. That is right.

Q. Mr. Natrella, as far as you know, did you take into account all trends that you were able to foresee or predict with any certainty in calculating the total asset figures that you would expect to exist in 1960 and 1965?

A. Yes, sir.

Mr. Bushby: I object to that. He has got to specify what he took into account.

Mr. Andrews: I think he already has, your Honor.

I said, "as far as he was aware"; I did not state that there were no other trends.

The Court: You may inquire on recross.

By Andrews:

Q. What was the answer?

A. Yes, sir, I did.

Q. Now, Mr. Natrella, referring back to these various statistics that you have been cross examined about at great

length, to your knowledge, are there any other comparable statistics published by any Government agency or any other source other than the Securities and Exchange Commission?

A. Statistics on?

[fol. 598] Q. On pension funds, and the various matters you have been cross examined about?

A. Well, these are the basic series at this time on pension funds and on security offerings. These series are the series used by the general public and by students in the field to represent and to measure the assets of pension funds and to measure the volume of security offerings.

Q. Mr. Natrella, you testified on cross examination that in making up these various tables that have been introduced into evidence, that you relied on receiving figures from various sources:

Now, I would ask you, do you rely solely on the figures that you receive from these sources, or do you evaluate them as to their reasonableness and accuracy by relying on your own knowledge and experience of collecting statistics for a period of twenty years for the Securities and Exchange Commission?

Mr. Cox: May we have that question read, please?

(Question read)

By Mr. Andrews:

Q. (Contining)—for the Securities and Exchange Commission?

In other words, could I do the same thing as you are doing; could I step into your shoes and pick up these things and publish them?

A. Let me answer the question as best I can.

We get various information from different agencies, from different people working in the field. We examine them—I do, and my staff does—to determine which are the ones we should use, and which do we feel perhaps are too high or too low, or maybe do not measure up to what we are trying to do, and do not meet our concept of the [fol. 599] figure we are trying to set up; so we do have to do that, yes.

Q. Is this the reason, Mr. Natrella, that you have some thirty eco· ists, financial analysts, and statisticians working for you?

A. Yes.

Mr. Andrews: I have no further questions.

Recross-examination.

By Mr. Bushby:

Q. I would like to ask this question: Can you point to the provision of law which authorizes you or requires you to get out these reports?

A. Which reports are you referring to?

Q. The statistics you say you report regularly, that you gather and report on.

A. On all these various statistics you are referring to, is that right?

Q. Yes, any of them.

A. Well, these statistics have to do partly with the workings of the Commission, in the sense that they have to know what is going on in the capital markets; they have that basic responsibility.

Now there is no actual provision of the law requiring the collection of certain data, but there are provisions that the SEC should be cognizant of factors in the capital markets.

Q. Would you tell us what they are?

A. Well, they are under—I believe that the provision of just keeping up with the general activities in the capital markets, I believe, is in the Securities and Exchange Act of 1934.

Q. Is there some provision for that?

A. I couldn't quote it, but I believe that there is. I would have to check it.

Q. I would appreciate it if you would.

A. Yes. I am not sure about the specific provision.

[fol. 600] Recross-examination.

By Mr. Cox:

Q. Mr. Natrella, I would like to ask you some few questions about the assumptions of the projections again. I am a little confused now. I understand you to say on cross that you assumed that the interest rate would remain throughout the period of projection at the same level that it is today. Was I wrong about that?

A. I don't believe I did. My answer was in terms that the interest rate was not considered in terms of projecting these figures.

Q. Mr. Natrella, you referred to a paper that you wrote, called "Implications of Pension Fund Accumulations."

A. Yes, sir.

Q. (Continuing) Read to the American Statistical Association?

A. Yes, sir.

Q. This paper contains a projection of the same kind you have testified to today, does it not?

A. Yes, sir. Those are the projections.

Q. Were those projections in that paper based on the same assumptions which support the projections you testified to today?

A. Those were the same projections, yes, sir.

Q. Well, I don't wish to read this, necessarily, into the record.

A. I have a copy here.

Q. Do you have a copy there?

A. Yes.

Q. Would you look at Page 143?

A. I can't. I have to refer to it in terms of the article and page number.

Q. Let me show you this. Just look at that paragraph, if you can find it.

A. Yes, sir, here it is.

Q. You have found it?

A. All right.

Now when I read that paragraph, Mr. Natrella, I get the impression that——

Will you look at the paragraph above that?

[fol. 601] Mr. Tierney: The record doesn't indicate what he is looking at.

Mr. Cox: We have told you.

Mr. Tierney: I didn't hear it.

Mr. Cox: You are looking at an article or speech, "Implications of Pension Funds Accumulations." by the witness, and which he testified he wrote on direct examination, and which he delivered to the American Statistical Association.

Mr. Tierney: Thank you.

By the Witness:

A. You are quite right. That was the situation.

By Mr. Cox:

Q. You did, I take it, Mr. Natrella, assume interest rates will remain at current levels throughout the projection period?

A. Which was in 1957. This paper was prepared then.

Q. And then in the next paragraph you assume that the Government securities are maintained at about the same absolute level as today, is that correct?

A. Yes, sir.

Q. What does that mean? Would you explain that to me?

A. Well, it simply means that new investments would be in fields other than Government securities.

Q. There would be no increase in the total amount of Government securities?

A. That is right. They would maintain that level, and any new funds coming into the pension funds would be invested in other media.

Q. You are talking about the amount of the assets in [fol. 602] the pension funds that would be represented by Government securities, is that correct?

A. That is right, which means that they would simply hold onto the Government securities—keep their Government securities level the same, and invest in other things, when new money came in.

Q. And I take it the sentences in here—"I have assumed that corporate bonds will stay at about the same proportion as today"——

A. That means "proportions" there.

Q. It is not absolute?

A. Not absolute, no. The proportion would increase as the assets increased.

Yes, that is right.

Q. And in common and preferred stocks, you say "which in 1956 amounted to 26 per cent of the total assets, I expect to rise to 30 per cent by 1960 and stay at about that proportion to 1965"?

A. Yes, sir.

Q. Mr. Natrella, do you feel competent to tell me whether, in your opinion, the nature of the assets in which the pension funds might invest in the future, as between funded debt and equities, that proportion might be affected in changes in the level of the interest rate?

If you feel you can't answer that, say so.

A I feel that I couldn't answer that.

Mr. Cox: That is all.

Recross-examination (Continued)

By Mr. Bushby:

Q. Just one more question.

Is there some provision of law in the federal statutes that authorizes employees of the SEC to testify as experts in litigation?

[fol. 603] Mr. Andrews: I object, if the Court please. This witness doesn't know what the provisions of law would be or whether he can testify or not.

The Court: Overruled.

By the Witness:

A. I don't know what the provisions of law are in this regard. I was permitted to testify in connection with the statistics for which I am responsible.

Q. Who requested you to do it?

A. What was that?

Q. Who requested you to come here and do it?

A. Do you mean how did it come about?

We publish certain statistics and I, being in charge of publication of those statistics, was asked how these statistics were put together. That is——

Q. And you were asked to come here?
A. I was asked to come here to explain how they were put together.
Q. And you would do that for any litigant?
A. Yes, sir.

Mr. Andrews: I have only one question, your Honor.

Redirect-examination.

By Mr. Andrews:

Q. Mr. Natrella, was a subpoena issued for your appearance here?
A. Yes, sir.
Q. In this hearing?
A. Yes, sir.

Mr. Andrews: That is all.
The Court: You are excused.

(Witness excused.)

Mr. Reycraft: We will call Mr. Emerson.

Sumner B. Emerson, called as a witness on behalf of the [fol. 604] Government, having been previously duly sworn, was examined and testified further as follows:

Direct Examination: (Continued)

Mr. Reycraft: In your book I believe there are some documents on the International Bank, and we will skip those and go to the General Motors Acceptance Corporation.

The Court: You are skipping the International Bank?
Mr. Reycraft: Yes, sir.
The Court: What number will that be?
Mr. Reycraft: 116 in the lower left-hand corner. The date is August 17, 1955.
Will you mark this as Government Exhibit 131 for identification?

(Thereupon said document was marked Government Exhibit 131, for identification.)

By Mr. Reycraft:

Q. I hand you Government Exhibit 131, for identification. Will you describe it, please?

A. It is a memorandum prepared by our Syndicate Department for statistical reasons, covering the offering on August 17, 1955, of $200 million General Motors Acceptance Corporation, 20-year—I can't read the coupon rate.

Mr. Reycraft: I can't, either.

Mr. Tierney: If the Court please, I would like to put a question to Counsel. Is it necessary to keep this witness on the stand all the time to put these documents in?

[fol. 605] Mr. Reycraft: No, I don't object to offering them in evidence.

Mr. Tierney: We may have an objection, I don't know. But we may be here a week or two weeks with this witness.

The Court: Maybe we can shorten this up?

Mr. Reycraft: I am glad to, your Honor. If your Honor wishes, I will go through and offer the documents, and if objections are made, then we can take them up.

Mr. Cox: Why don't you do that and let the witness step down? Then if you want to call him back, he can come back.

Mr. Reycraft: I have no objection.

Mr. Bushby: We just have these standing objections we made of the same type.

The Court: Yes. The record may show the standing objections.

Mr. Reycraft: I offer Government Exhibit 131.

(Said document, so offered and received in evidence, was marked Government Exhibit 131.)

Mr. Reycraft: Will you mark for identification as Government Exhibit 132 the document which bears the number 115 in the lower left-hand corner and is an analysis of distribution of $200 million of General Motors Acceptance Corporation, and has the offering date in the upper left-hand corner August 17, 1955?

(Thereupon said document was marked Government Exhibit 132, for identification.)

The Court: It is understood that you have a stand-

[fol. 606] ing objection, but unless you want to argue the

objection on one of these especially, it is understood they are all received, so I will not have to keep repeating that on each single one?

Mr. Bushby: There is one type that occurs once in a while that we would like to be heard on. It lists issues where Morgan Stanley is not the manager.

The Court: Except in those cases, let it be understood for the record that they are all received in evidence.

Mr. Reycraft: I offer Government Exhibit 132 into evidence.

(Thereupon said document, so offered and received in evidence was marked Government Exhibit 132.)

Mr. Reycraft: Will you mark for identification as Government Exhibit 133 the document which bears the numbers 329 and 330 in the lower left hand corner, the date of the prospectus being February 18, 1958; amount of issue, $150 million, General Motors Acceptance Corporation, 21-year four per cent debentures due 1979.

I offer Government Exhibit 133.

(Said document so offered and received in evidence was marked Government Exhibit 133.)

Mr. Reycraft: I refer next to a document which bears the number 328 in the lower left-hand corner, headed Analysis of Distribution of $150 million General Motors [fol. 607] Acceptance Corporation, 21-year, four per cent debentures.

I will ask that this be marked Exhibit 134 for identification, and I offer Government Exhibit 134.

(Said document, so offered and received in evidence was marked Government Exhibit 134.

Mr. Reycraft: I refer next to a document which bears the number 102 in the lower left hand corner, which is entitled, Breakdown of Sales of Certain Issues, dated August 2, 1955.

I believe we may have to have the witness explain which of these were managed by Morgan Stanley.

(Thereupon said document was marked Government Exhibit 135 for identification.)

By Mr. Reycraft:

Q. Mr. Emerson, will you state which of the issues set forth in this document were managed by Morgan Stanley?

A. All of them.

Mr. Reycraft: I offer Government Exhibit 135.

(Said document, so offered and received in evidence was marked Government Exhibit 135.)

Mr. Reycraft: I shall next refer to a document bearing the numbers 52 and 53 in the lower left-hand corner, the date of the prospectus being December 9, 1953, amount of issue, $300 million, General Motors Corporation, 25 year 3¼ debentures.

I will ask that this be marked for identification as Government's Exhibit 136, and I offer it in evidence.

(Said document, so offered and received in evidence was marked Government Exhibit 136.)

[fol. 608] Mr. Reycraft: I next refer to document which bears the numbers 45, 46, and 47, a price record, with the date January 7, 1954 in the upper right hand corner, relating to the same issue as Exhibit 136.

I will ask that this be marked Exhibit 137 and offer it in evidence.

(Said document, so offered and received in evidence was marked Government Exhibit 137.)

Mr. Reycraft: I next refer to a document which bears the numbers 28, 29, 30, and 31 in the lower left hand corner, entitled, "Financing Methods as Summarized by Morgan Stanley & Co., 9/25/53."

I will ask that this be marked Government Exhibit 138 for identification, and I offer Exhibit 138 into evidence.

(Said document, so offered and received in evidence was marked Government Exhibit 138.)

Mr. Reycraft: I refer next to a two-page document, dated July 30, 1953, which bears the numbers 22 and 23 in the lower left hand corner.

I will ask that it be marked Exhibit 139 for identification, and I offer the said exhibit.

(Said document, so offered and received in evidence was marked Government Exhibit 139.)

Mr. Reycraft: I refer next to a document dated December 3, 1953, which is a letter from P. E. H. to Fredrick G. Donner, Esq., Vice President, General Motors Corporation, which bears the numbers 250, 251 in the left-hand corner.

There is an attached table dated December 8, 1953, a price record of this issue. May the record show that [fol. 609] P. D. H. is Perry Hall, managing partner of Morgan Stanley?

Will the reporter mark this as Government's Exhibit 140? Well, I will withhold this exhibit.

Mr. Burnham: May the record show when you say "this exhibit," you are referring to Government Exhibit 140 for identification?

Mr. Reycraft: All right, 140.

Mr. Burnham: On Government's Exhibit 140, my difficulty is solved, so you may offer it subject to our original objection.

Mr. Reycraft: I offer Exhibit 140.

(Said document, so offered and received, was marked Government Exhibit 140.)

Mr. Reycraft: Now, will you mark for identification as Government's Exhibit 141, the document that bears the number 233 in the lower left-hand corner. This is a letter from Harold Stanley, which is addressed, "Dear Mr. Curtice."

(Whereupon said exhibit was marked Government's Exhibit 141, for identification.)

Mr. Reycraft: I offer Government's Exhibit No. 141.

(Said document, so offered and received, was marked Government's Exhibit No. 141.)

Mr. Reycraft: Now, I refer next to the document which bears the number 232 in the lower left-hand corner, a letter from Harold Stanley addressed to Mr. Sloan, dated January 5, 1954.

[fol. 610] Will you mark this Government's Exhibit 142?

(Whereupon said exhibit was marked Government's Exhibit 142, for identification.)

Mr. Reycraft: I offer Government's Exhibit No. 142.

(Said document, so offered and received in evidence, was marked Government's Exhibit No. 142.)

Mr. Reycraft: I refer next to a document which bears the number 241 in the lower left-hand corner, a letter dated January 12, 1954, from Alfred P. Sloan to Mr. Harold Stanley.

Will you mark this as Government's Exhibit 143?

(Thereupon said document was marked Government Exhibit 143, for identification.)

Mr. Reycraft: I offer Government's Exhibit 143.

(Said document, so offered and received in evidence, was marked Government Exhibit 143.)

Mr. Reycraft: Now, I refer next to a document number 228, a letter which bears the initials "HBL" in the lower left-hand corner, dated January 13, 1954, addressed to Mr. Frederick G. Donner. Would you mark that as Governments Exhibit 144?

(Thereupon said document was marked Government Exhibit 144, for Identification.)

Mr. Reycraft: I offer Government's Exhibit 144.

(Said document, so offered and received in evidence, was marked Government Exhibit 144.)

Mr. Reycraft: Now, I refer next to a letter which bears [fol. 611] the number 229, and is signed "PEH", addressed to Albert Bradley, Esq., dated January 13, 1954.

Will you mark this as Government's Exhibit 145?

(Thereupon said document was marked Government Exhibit 145, for identification.)

Mr. Reycraft: I offer Government's Exhibit 145.

(Said document, so offered and received in evidence, was marked Exhibit 145.)

Your Honor, that completes the documents we have to offer through Mr. Emerson. There are a few miscellaneous ones which we can get to later on, if we may. Now, I have some general questions of Mr. Emerson. If your Honor wishes, we can proceed, or would this be a convenient time to adjourn?

The Court: You have another 15 minutes.

Mr. Reycraft: All right, sir.

By Mr. Reycraft:

Q. Mr. Emerson, with respect to the offering of rights of General Motors in 1955, did you anticipate before this rights offering that the price of General Motors stock in the market would decline?

A. Yes.

Q. Did you make an estimate of the amount?

A. If we did I do not remember.

Q. Do you attribute the entire decline in price, of market price of General Motors stock during that offering, to the offering?

A. Substantially all of it.

Q. Are you familiar with any other factors which may have affected the decline?

A. I know of no others.

[fol. 612] Q. Will you explain what effect on the market price of stock during a rights offering the dilution of earnings has?

Do you understand what I mean by dilution of earnings?

A. I know what you mean. It is hard to answer it because some people claim that it does not exist. In the case of the General Motors offering, which I think was at the ratio of 1 for 20, that is, one new share for each 20 old shares held, there would be a short period—by that I mean, oh, six months, a year—when that money was not yet productive.

Therefore, during that period, assuming that the earnings of a corporation had not increased from other factors, they would be slightly less per share because that would be 21 shares outstanding where there had been 20 shares before; but once that money was invested and productive there should be no dilution.

Q. You estimated that a period of approximately one year would pass before that?

A. It varies. I have forgotten what the purpose of the financing was, but I would assume that it would take six months to a year to get that money productive.

Q. Do you assume that in the case of each rights offering the price will decline?

A. In substantially every case, yes.

Q. Do you make the same assumption with respect to each secondary that you manage?

A. Yes. That might not be true in the case of very small secondaries, but is certainly for a secondary of any size—we assume it would have a depressing effect on the market.

Q. By way of illustration, let us take the Sloan secondary. As to that secondary, you anticipated before this issue [fol. 613] that they would be a decline in the market?

A. That is correct.

Q. Now, do you think——

A. Not necessarily a decline—an impact. If the rest of the market went up five per cent and that stood still, there still would have been an impact.

Q. Well, now, do you think that it is fair or accurate to say if the price is depressed by, say, for example, $2.00 or fails to go up $2.00, that all the stockholders of a company have lost $2.00?

A. If the market is depressed by $2.00 a share, every stockholder has lost that in market value.

Q. Well, do you think it is accurate to say then that the stockholder has lost that amount of market value?

A. In market value, yes.

Q. Even though he holds during the period of depression?

A. That is correct, yes.

Q. Well, do you assume, with respect to both secondary and rights offering that within a relatively brief period of time the market will absorb this volume and the price will be determined with regard to the normal market factors?

A. It is very hard to generalize on that.

Mr. Bushby: I do not think the witness ought to be asked to answer as broad a question as that, regardless of the size.

The Court: Overruled.

By Mr. Reycraft:

Q. Well, will you relate your answer to the Sloan secondary?

A. I do not remember what we said to them as to the continuation of the impact.

[fol. 614] I am sure that we must have pointed out to the officers of the Sloan Foundation that in all probability there would be a market impact because that is standard procedure in our office where there is an offering of size.

Q. Well, if the price of General Motors stock on the New York Stock Exchange went down as much as $2.00 on the Sloan offering, do you think it is fair to say that with respect to each of the 280 million shares of General Motors stock outstanding there was a loss of that amount?

A. A loss of market value.

Mr. Cox: May it please the Court, what is the purpose of a question of that kind? I object to it. Mr. Emerson is not here to testify whether a statement is fair or not. I think he should not be examined on semantics.

The Court: Sustained.

By Mr. Reycraft:

Q. Mr. Emerson, what weight do you give to turnover ratios of outstanding amounts of stock as affecting its price?

A. I could not hear.

Q. What weight do you give to the percentage of trading on exchanges of the total amount of a company's stock outstanding in assessing the effect on the company's stock?

A. I would think we gave very little effect to the percentage. We would give much more attention to the actual volume of trading in relation to the size of the security being offered.

Q. Would you consider it valid to relate it to the total existing equity in the company?

A. Well, I hear your question but I don't understand it.

[fol. 615] Q. Well, if, for example, the 20 per cent of the equity of a particular company is being offered, is this likely to have a greater effect on price than if it is 2 per cent of the equity?

A. And this is the same company in both cases?

Q. Yes, sir.

A. Well, obviously, if you are offering ten times as much stock it is going to have a bigger impact.

Q. Now, assuming that there are two different companies with the same dollar value of the offering; do you think that the effect would be greater with respect to a company which has a smaller total equity or a company which has a larger total equity?

A. I think it would make very little difference. It would depend on the normal volume of trading. In other words,

how large is the security to be offered in relation to the normal volume.

Q. Mr. Emerson, we had a good deal of discussion of rights offerings. Now, in many of these offerings—and again I refer specifically to the General Motors rights offering—in each case many shareholders don't exercise the right, isn't that true?

A. Yes, sir.

Q. And they do not sell them also, isn't that true?

A. Well, there are very few that don't sell them.

Q. Well, as to those, what happens to the rights and what happens to the stock that underlies the rights?

A. That are not exercised by any body?

Q. Yes, sir.

A. The rights expire. The stock is defined in the agreement as unsubscribed stock. It is delivered to the underwriters against payment at the subscription price. That is the nature of their contract.

[fol. 616] They have agreed to take up all such unsubscribed stock whether it may be large or small.

Q. These stockholders in effect lose the value of their rights, is that right?

A. That is right.

Q. And this amount is in effect taken up by the underwriters?

A. It is taken up by the underwriters. In the case of the General Motors Corporation, it was sold above the subscription price and all of the net profit of the underwriting group over the subscription price was turned over to the General Motors Corporation.

Q. Now, when you set a discount in connection with the rights offering, Mr. Emerson, is one of the reasons you establish a disconnt to permit a stockholder who does not have sufficient cash to exercise his right to sell the rights?

A. That is one factor. Some corporations like to give their stockholders a right of value so that the stockholders feel that they have been given something. Others do not take that same point of view.

Q. In other words, if a stockholder wants to exercise his rights he must have ready cash to do it, isn't that correct?

A. Or be able to borrow.

Q. And as to those who don't, it is the intention to permit them to sell them and to realize some profit?

A. That is right.

Q. Now, isn't it true that with respect to a rights offering, if an issuer wants to raise a particular amount of money, he can offer, for example, 100 million dollars—he can offer a million shares at $100 or two million at $50, so the number of shares isn't really an overriding consideration?

A. He could do the latter. He would be reluctant to for the reason that those people who did not exercise their rights would have had a greater loss of a rights value.

[fol. 617] Q. You have testified that a very small number do.

A. In most cases.

Q. So that an issuer does have a considerable amount of latitude, does he not, in setting the percentage discount from the market price?

A. Well, he has a latitude in the sense that he can set it as low as he wishes from his own point of view. He cannot set it too close to the market and have it underwritten, unless the underwriting group is willing to take that commitment.

Q. Certainly he can if the rights are to retain value, isn't that right?

A. (Witness nodding head).

Q. Now, can you tell us, if you know, what the cost of the du Pont Company of selling the rights which it received in 1955 would have been?

A. I have no knowledge. Had they sold the rights to the underwriting group, there would have been no cost, no commission cost.

Q. And they would have been able to receive or realize the general going price for those rights, isn't that correct?

A. Approximately, yes. In a block of that size, whether it would have been necessary to make the bid a little under the market or not, I can't tell. We never had to face the problem.

Q. After the General Motors rights offering in 1955, is it a fact that General Motors had more stockholders than before?

A. I understand they had a substantially larger number.

Q. This indicates, does it not, that new buyers, new investors in General Motors stock had been found?

A. Yes, sir.

Q. And doesn't this generally happen with respect to each rights offering?

A. It very frequently happens if you have layoff—par-
[fol. 618] ticularly if you have a layoff procedure.

Q. And layoffs are virtually all to new investors, is that correct?

A. That is not necessarily correct, no, but in many cases they would be. I suppose in a substantial number of them they would be.

Q. Well, do you infer from the fact that, as you have testified, generally after a rights offering the company has more stockholders, that these are new investors?

A. Yes.

Q. Now, many of these documents have indicated that banks are purchasers of both stocks and debentures; does that fact indicate that the bank is purchasing for its own account?

A. It does not.

Q. So that we cannot draw any inference really from the fact a bank is a purchaser?

A. You can draw no inference at all, except in the case of stocks you can be pretty sure it is not for their account.

Q. And in your experience do banks do considerable amount of purchasing for trust accounts and ageney accounts?

A. Certain banks do. Others do not.

Q. And do legal restrictions you referred to to banks apply to these accounts?

A. I don't understand your question.

Q. Well, you referred to legal restrictions on banks purchasing common stocks for their own accounts.

A. They can't do it.

Q. Right.

A. That would not apply to their purchases for trust funds or for pension funds or for agency funds, various other types of transactions of that sort.

Q. Are you familiar with an exchange distribution, Mr. Emerson?

A. In a general way.

[fol. 619] Q. Could you explain what an exchange distribution is?

A. If someone wishes to offer a block of stock that is larger than they would normally handle the regular way on the New York Stock Exchange, that is, as a brokerage item, but it not large enough to require a secondary distribution, they can make an offering of this block on the floor of the Exchange, allowing a concession to member houses which could be more than a Stock Exchange commission.

Q. Do you recall any of these transactions which Morgan Stanley handled?

A. We handled only one.

Q. Which was that, sir?

A. It was an offering of stock of the U. S. Steel Corporation quite a number of years ago.

Q. Are you familiar with the dividend record of General Motors?

A. Not exactly.

Q. Are you familiar with it in a general way?

A. I know what they are paying currently.

Q. You have participated and made recommendations on their financing over a period of years, haven't you?

A. Yes.

Q. So that you are familiar with it in a general way, aren't you?

A. Yes.

Q. Do you think it is comparable to the dividend record of a utility, such as AT&T or Philadelphia Electric, in terms of its stability?

A. In terms of stability?

Q. Yes, sir.

A. No.

Q. Would you be able to make a generalization as to the degree of difference between them?

A. No, that gets into so many factors that could happen that I do not think you can put a percentage relationship on it.

[fol. 620] Q. Well, would you characterize General Motors' dividend record as volatile?

A. As compared to many corporations, no.

Q. As compared with only industrial corporations?

A. As compared with many industrial corporations, no.

Q. As compared with utilities?

A. I think it is more volatile than that of most large operating utilities.

Q. Now, Mr. Emerson, you referred in your testimony on the General Motors rights issue to a price record which was identified as du Pont Exhibit No. 3. I do not have a copy of that right now, but, as I recall, that began on January 1, 1955 and continued sometime through March?

A. I think that is correct.

Q. Now, can you say that this price record represents a fair record of the market performance of this issue?

A. Yes.

Mr. Cox: That period of time covered by the price record.

Mr. Reycraft: Pardon me?

Mr. Cox: That period of time covered by the price record.

Mr. Reycraft: Yes.

By Mr. Reycraft:

Q. Now, can you tell me who selected the starting date on that exhibit?

A. Well, I did.

Q. You did.

A. Yes.

Q. Did you select the end date also, sir?

A. No, and I don't remember who did.

[fol. 621] Q. Could you say why or what particular reason you had for picking that beginning date, which I believe was January 1st?

A. Well, one reason was it was the first of the year, and the other reason was it was a couple of days before the announcement of the financing. The financing was announced, as I remember it, January 3rd, 1955.

Q. Were there any other factors which might affect the price of General Motors stock which occurred shortly before that time?

A. Not that I remember.

Q. Do you recall any discussion of a possible stock dividend?

Mr. Cox: Mr. Emerson testified to that on direct examination. He explained that price increase by saying there had been a rumor.

Mr. Reycraft: Well, I am asking these questions in relation to that exhibit to determine what factors went into selecting his time period.

Mr. Cox: Well, I think you are really cross-examining the witness, and I do not think in fairness you ought to try to trap him. You ought to tell him what he said.

Mr. Reycraft: I am not trying to trap him. I think he recalls what he said.

By Mr. Reycraft:

Q. My point, Mr. Emerson, is I believe you testified that a stock dividend was expected shortly before the first of the year. My question then is with respect to this time period, did it not begin at a high point of the year?

A. No, it did not begin at a high point. That is why we started it January 1st. The rumor of the stock split—and [fols. 622-623] I cannot say that it was expected, it was just one of those rumors in the market—took place on, as I remember it, January 5th, which was the date of the meeting of the directors of the General Motors Corporation.

During that day this rumor got around, and the stock did go up and, therefore, to show what the market had been prior to that rumor we put two days additional on; in other words, started it January 3rd instead of January 5th, just to be fair.

Mr. Reycraft: I have no further questions.

The Court: We will recess now.

(Whereupon an adjournment was taken in the above entitled cause until 10:15 o'clock a.m. of Wednesday, February 25, 1959.)

[fol. 624]

Transcript of Proceedings of February 25, 1959

Offers in Evidence

The Clerk: Case on trial.

The Court: Proceed, gentlemen, please.

Mr. Burnham: Your Honor, yesterday when Mr. Stanley was on the stand, there was a question about the 1958 purchases by the trustees of the General Motors' Pension Trusts of General Motors stock.

We have now prepared an exhibit which has been marked General Motors Exhibit 5. It includes the entire 1958 figure, as well as the earlier ones.

(Thereupon said document was marked General Motors Exhibit 5 for identification.)

Mr. Burnham: I have spoken to Mr. Reycraft about this, and we would like to offer that as General Motors Exhibit 5.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked General Motors Exhibit 5.)

Mr. Reycraft: May it please the Court, there are twelve exhibits which were received in evidence during the trial of this case, which relate to relations between Christiana, Delaware and du Pont, which we would like to have marked for identification in this hearing.

The first of these is Exhibit No. 66, which is a letter to Mr. Irenee du Pont, dated September 13, 1923. I will ask the reporter to mark this as Government Exhibit——

Mr. Bushby: If your Honor please, this is objectionable. I understand that that case is still open, and we can refer to anything that was introduced in the trial, providing it has a bearing on this. I understand we are not barred from using anything introduced in that trial. I see no purpose [fol. 625] in cluttering the record with new copies of the same exhibits.

Mr. Reycraft: There are only twelve of these. I certainly don't think it is cluttering the record, and we think it relates to the issues in this hearing specifically. These are the only documents as to which we request your Honor's permission to adopt this procedure.

Mr. Tierney: May I suggest the proper procedure for the Government to follow is to refer to the documents in

the old record, without reintroducing them. They are already here. They clutter up the record, and that is not the proper procedure.

The Court: The best procedure is the simplest. If they are already in the record—was this introduced in the case in chief?

Mr. Reycraft: Yes, your Honor, but it seems to us it would be a convenient reference to have them in this record, at this hearing.

Mr. Tierney: They are already in the record.

The Court: I will sustain the objection.

Mr. Reycraft: May I go ahead and have these marked for identification at this time, the twelve exhibits which we want to refer to?

Mr. Tierney: File a designation as to those you want to put in.

Mr. Reycraft: All right, we will follow that.

Mr. Tierney: To those you want to refer to.

Mr. Reycraft: All right.

[fol. 626] Will you mark for identification as Government Exhibit 146, the document which is headed "General Motors Corporation, fifty largest stockholders of record, August 8, 1955, in terms of 1⅔ par value common stock"?

(Thereupon said document was marked Government Exhibit 146, for identification.)

Mr. Reycraft: I offer Government Exhibit 146, the stockholders' list of General Motors Corporation, in evidence.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 146.)

Mr. Reycraft: Will you mark for identification as Government Exhibit No. 147, a document headed, "Extract from Report to the Bonus and Salary Committee from Alfred P. Sloan, Jr., Employees Savings Stock Purchase Program, July 12, 1955."

(Thereupon said document was marked Government Exhibit 147, for identification.)

Mr. Burnham: What is the date of that again?

Mr. Reycraft: July 12, 1955, extract from report to the Bonus and Salary Committee from Alfred P. Sloan, Jr.

Mr. Burnham: No objection.

Mr. Reycraft: I offer Government Exhibit 147.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 147.)

Mr. Reycraft: Will you next mark for identification as Government Exhibit 148 a document which is headed, "Extract From Report to the Special Committee to Review [fol. 627] Bonus Plan from Albert Bradley, Review Bonus Plan to Provide for the use of Newly Issued Stock, January 3, 1957."

Mr. Burnham: That is the one with the attached exhibit?

Mr. Reycraft: There is attached to this document a document marked Exhibit 2, General Motors Corporation, shares of General Motors common stock purchased as per cent of total traded on New York Stock Exchange, and it goes from the years 1947 through 1956.

(Thereupon said document was marked Government Exhibit 148 for identification.)

Mr. Reycraft: I offer Government Exhibit 148.

Mr. Tierney: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 148.)

Mr. Reycraft: Will you mark for identification as Government Exhibit 149, a document which is headed Common Stock. Size of holdings by share groups, August 14, 1958.

(Whereupon said document was marked Government Exhibit 149, for identification.)

Mr. Reycraft: The document does not indicate on its face, but, Mr. Burnham, do you identify this as a list of holdings of General Motors common stock?

Mr. Burnham: That is correct, and it was furnished to you by General Motors Corporation.

Mr. Reycraft: I offer Exhibit 149.

The Court: It is admitted.

[fol. 628] (Said document, so offered and received in evidence, was marked Government Exhibit No. 149.)

Mr. Reycraft: Will you mark for identification as Government Exhibit No. 150, a 2-page document, the first page headed "Extract from Report to the Bonus and Salary Committee from H. W. Megee, Revision of Bonus Plan to Provide for Use of Newly Issued Stock, May 31, 1955."

The attachment to this document is headed Exhibit 2, General Motors Corporation, Shares of General Motors Common Stock Purchased as Per Cent of Total Traded on New York Stock Exchange, and it goes for the years 1947 through the first four months of 1955.

(Thereupon said document was marked Government Exhibit 150 for identification.)

Mr. Reycraft: I offer Government Exhibit 150.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit No. 150.)

Mr. Reycraft: Will you mark for identification as Government Exhibit 151, a list consisting of twelve pages, which is headed E. I. du Pont de Nemours and Company, list of common stockholders holding 5,000 shares or more, as of December 31, 1956?

On the last page a summation appears, 599 stockholders, 30,890,658.

(Thereupon said document was marked Government Exhibit No. 151 for identification.)

Mr. Reycraft: I offer Government Exhibit 151.

Mr. Cox: No objection.

The Court: It is admitted.

[fol. 629] (Said document, so offered and received in evidence, was marked Government Exhibit No. 151.)

Mr. Reycraft: Will you mark for identification as Government Exhibit 152, a letter from Mr. Philip C. Scott to Eugene J. Metzger, dated February 4, 1959, which refers to a list of stockholders of Christiana, prepared for use in connection with an annual meeting of that company.

(Thereupon said document was marked Government Exhibit 152, for identification.)

Mr. Reycraft: I offer Government Exhibit 152.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 152.)

Mr. Reycraft: Will you mark for identification as Government Exhibit No. 153, a seven page document headed, "Christiana Securities Company, Summary Schedule Stock Ownership Study, Record Date, 1/15/57, Using Holdings of 50 Shares or More."

The attached Exhibit 1 is headed, "Christiana Securities Company, Common Stock Owned by Members of the du Pont Family of Record, as of 1/15/57."

Exhibit 2 is headed, "Christiana Securities Company Common Stock of Record as of 1/15/57, owned by Trusts of Members of the du Pont Family, Family Owned Investment Companies, and by Charitable Foundations Created by Members of the Family."

Exhibit 3 is headed, "Christiana Securities Company Common Stock owned by Institutions and Charities, 1/15/57."

[fol. 630] Exhibit 4 is headed, "Christiana Securities Company Common Stock owned 1/15/57, by Insurance Companies, Investment Companies, and so forth."

Exhibit 5 is headed, "Christiana Securities Company Common Stock owned 1/15/57, by Males and Females other than those Listed in Exhibit 1."

Exhibit 6 is headed, "Christiana Securities Company Common Stock owned 1/15/57, by Trustees or Nominees."

(Thereupon said document was marked Government Exhibit 153, for identification.)

Mr. Reycraft: I offer Government Exhibit 153 into evidence.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 153.)

Mr. Reycraft: Will you mark for identification as Government Exhibit 154, a document headed Delaware Realty Stockholders, and on the right-hand side, Delaware Realty Shares Owned.

This is a 10-page document giving the total stockholdings in Delaware Realty Company of 785,000 shares and the number of shareholders, 205.

The footnote on the first page indicates that the shares of record were as of August 26, 1957.

(Thereupon said document was marked Government Exhibit 154 for identification.)

Mr. Reycraft: I offer Government Exhibit 154.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit No. 154.)

[fol. 631] Mr. Reycraft: Will you mark for identification as Government Exhibit 155, a document which is headed Moody's Bank and Finance Manual, page 391? It refers to the Wilmington Trust Company.

(Thereupon said document was marked Government Exhibit 155 for identification.)

Mr. Bushby: May I see that? Would you mind stating what the purpose of the introduction of a page of this manual is?

Mr. Reycraft: It lists the officers and directors of the Wilmington Trust Company. We intend to refer to these facts later.

Mr. Bushby: I have no objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 155.)

Mr. Horsky: May I suggest you just offer the portion of that document which refers to Wilmington Trust, so we won't have to copy the whole business?

Mr. Reycraft: Yes, I think that is a useful suggestion. I offer only the portion that refers to Wilmington Trust.

Will you mark for identification as Government Exhibit No. 156, Page 1599 from Moody's Bank and Finance, dated November 5, 1958, which also refers to Wilmington Trust Company?

Mr. Bushby: With the same limitation?

Mr. Reycraft: Yes, the same limitation. I offer only the part that refers to Wilmington Trust Company.

(Said document, so offered and received in evidence, was marked Government Exhibit No. 156.)

[fol. 632] Mr. Reycraft: Will you mark for identification as Government Exhibit 157, a 2-page document, Pages 122 and 123 from Moody's Bank and Finance Manual, which refer to the Delaware Trust Company?

(Thereupon said document was marked Government Exhibit 157, for identification.)

Mr. Reycraft: I offer that part which refers to the Delaware Trust Company.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit No. 157.)

Mr. Reycraft: Will you mark for identification as Government Exhibit No. 158, a 2-page document, which is Pages 550 and 551 of Moody's Bank and Finance Manual. It refers to Christiana Securities Company, and I offer only that part which refers to Christiana.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit No. 158.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit 159, a letter from Victor R. Hansen to the Office of the Secretary of State, State of Delaware, Dover, Delaware, dated February 4, 1959?

This is a request for reports made to the State of Delaware relating to Delsoma Corporation, Chichester du Pont Foundation, Longwood Foundation, Inc., Naed Corporation, Ridgely Realty Company and Winterthur Corporation.

(Thereupon said document was marked Government Exhibit 159, for identification.)

[fol. 633] Mr. Reycraft: I offer Government's Exhibit 159.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 159.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit 160, a report on the form of The State of Delaware, entitled, "1958 Annual Report, Delaware Corporation," by the Chichester du Pont Foundation, 1030 du Pont Building, 101 West Tenth Street, Wilmington, Delaware?

(Thereupon said document was marked Government Exhibit 160, for identification.)

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 160.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit 161 a report to the State of Delaware by the Longwood Foundation, 1410 de Nemours Building, Wilmington, Delaware.

This is a two-page document.

(Thereupon said document was marked Government Exhibit 161 for identification.)

Mr. Reycraft: I offer Government Exhibit 161.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 161.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit 162 a report to the State of Delaware [fol. 634] by the Naed Corporation, 1090 du Pont Building, Wilmington, Delaware. This is a two-page document.

(Thereupon said document was marked Government Exhibit 162 for identification.)

Mr. Reycraft: I offer Government's Exhibit 162.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 162.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit 163 a 1957 annual report to the State of Delaware by Ridgely Realty Company, 229 Delaware Trust Building, Wilmington, Delaware.

(Thereupon said document was marked Government Exhibit 163 for identification.)

Mr. Reycraft: I offer Government's Exhibit 163.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 163.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit 164 a 1957 annual report by Winterthur Corporation, 7 West Tenth Street, Wilmington, Delaware. It is a three-page document.

Thereupon said document was marked Government Exhibit 164 for identification.)

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 164.)

[fol. 635] Mr. Reycraft: Will you mark for identification as Government's Exhibit 165, a letter dated February 4, 1959, from Victor R. Hansen to The Office of the Prothonotary, County of New Castle, Wilmington, Delaware?

(Thereupon said document was marked Government Exhibit 165, for identification.)

Mr. Reycraft: I offer Government's Exhibit 165.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Government Exhibit 165.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit 166, a document received in reply to the letter, Government's Exhibit 165, a report by Lack & Lindsay?

(Thereupon said document was marked Government Exhibit 166, for identification.)

Mr. Reycraft: I offer Government's Exhibit 166.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Government Exhibit 166.)

Mr. Reycraft: Will you mark for identification as Government's Exhibit 167, a report to the same source by Mertz & Moyer, filed on May 6, 1952?

(Thereupon said document was marked Government Exhibit 167, for identification.)

Mr. Reycraft: I offer Government's Exhibit 167.

The Court: It is admitted.

[fol. 636] (Said document, so offered and received in evidence, was marked Government Exhibit 167.)

Mr. Andrews: Next, your Honor, the Government would like to call Dr. Murray to the stand.

Roger F. Murray, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Andrews:

Q. Could we have your full name and home address, please?

A. My name is Roger F. Murray. I live at 230 Riverside Drive, New York City.

The Court: What is the first name? I did not hear.

The Witness: Roger.

By Mr. Andrews:

Q. Would you tell us what your present position is?

A. I am a professor of finance at the Graduate School of Business, Columbia University.

Q. Would you give us your academic background as to the colleges and universities you have attended, degrees you have received, and any honors you received while at these institutions?

A. I was graduated from Neal College in 1932 with a B.A. degree and membership in Phi Beta Kappa. I received my M.A. degree from the Graduate School of Business of New York University in 1938 and my Ph.D. from the same institution in 1942.

I was elected to Beta Gamma Sigma as a student there.

Q. Dr. Murray, would you tell us what your business experience was prior to your accepting this position at Columbia?

[fol. 637] A. I was employed by Bankers Trust Company on graduation from college in 1932 and remained in its employ, the last year or so on a part-time basis, until 1957.

Q. Would you briefly relate the positions you held while with the Bankers Trust Company in New York and for what periods of time you held these positions?

A. May I refer to my notes on that?

Q. Yes, sir.

A. From 1932 until 1942 I was engaged in the management of investment portfolios in the Trust Department of the bank. Then I served as a business economist in the Credit and Security Research Department until 1943, when I entered military service.

After returning from military service in 1945, I was elected an assistant vice president in the Credit and Security Research Department.

In March, 1946, I was elected a vice president of the bank and was in charge of that same department, the Credit and Security Research Department, until 1949.

From 1949 until 1952 I was vice president in charge of the Economics Department of the Bank; and in June, 1952, through the end of 1955, I was vice president in charge of Institutional Investment Advisory Services in the Trust Department of the Bank.

From the end of 1955, while I served on a part time basis, I worked as a consultant to the Pension Division of the Trust Department of the Bankers Trust Company.

Q. Dr. Murray, does the Bankers Trust Company of New York handle any pension funds?

A. Yes, they handle a very large volume. I would say that they are probably the leading bank in this field.

Q. Again, by way of background, Dr. Murray, would [fol. 638] you give us your academic or teaching experience, please?

A. When I resigned from the Bank at the end of 1955, I went to the Business School as an Associate Dean and as Adjunct Professor of Finance, and at that time I taught the seminars in investment manager problems.

On July 1st of last year I resigned as Associate Dean to give my full time to teaching and research; and at that time I was elected a Professor of Finance, and I am now teaching in the Finance Division on a full time basis.

Q. Would you give us some of the other organizations or groups that you belong to, both professional and business; and tell us any positions that you may hold with these particular groups?

A. Well, I am a Trustee, Member of the Finance Committee, and Chairman of the Securities Investment Committee of the New York Savings Bank.

I am a Trustee and Member of the Executive Committee of the College Retirement Equities Fund, which is the variable annuity affiliate of the Teachers Insurance Annuity Association.

I am a Director of Gould's Pumps of Seneca Falls, New York.

I am a Member of the Council on Accountancy of the State of New York, a member of the Research Counsel of the American Bankers Association, a Member of the Investment Committee of the Social Science Research Counsel, and I act as Trustee and Treasurer of the Collegiate School and in certain other non-profit organizations.

Q. Dr. Murray, I know that you have published a great deal of material and writings. Would you list some of the more pertinent ones which would be relevant to your testimony today?

A. Going back to 1949 and 1950, I started writing and speaking on numerous occasions regarding pension funds. [fol. 639] I would mention, for example, an article in the June, 1950 issue of "Trusts and Estates" magazine on the "Impact of Industrial Pensions on Capital Markets;" in the Journal of Finance for May, 1952, "Investment Aspects of the Accumulation of Pension Funds".

Q. Doctor Murray, if it would expedite matters, just read the complete list rather than picking them out separately.

A. "Pension Funds and the Capital Market", "American Economic Securities", October-November, 1952; "The Effect of Retirement and Pension Funds on Savings", "A Chapter in Savings in the Modern Economy", published by the University of Minnesota Press, 1953; "Pension Funds as a Market for Mortgages", "Conference of the Mortgage Bankers Association in New York University", January, 1953; "A Look Ahead at the Capital Markets", "The Comptrollers", September, 1953; "New Life in the Corporate Bonds Market", "Analyst Journal", November, 1953; "The Impact of Pension Funds on the American Capital Markets", "Skandinaviska Banken Quarterly Review", April, 1954; "Corporate Securities in the Pension Trust Picture", "American Statistical Association", Sep-

tember, 1954; "The Impact of Private Pension on Capital Formation and Investments", "A Chapter in Pensions, Problems and Trends", published by the Heubner Foundation for Insurance Education, University of Pennsylvania Press, 1955; "A Fresh Look at Pension Funds, Trusts and Estates", November, 1955; "Pension and Welfare Funds as a Mortgage Market", "Conference of the Mortgage Bankers Association of America, New York University", January, 1957; "Institutional Influences on the stock market", Analyst Journal for May, 1958.

[fol. 640] Q. I don't know if I asked you this, Dr. Murray, but what course are you now teaching at the Columbia Graduate School of Business?

A. I am teaching a course in Credit and Credit Institutions, a course in Security Analysis, a course in Corporation Finance, and a course called "Capital Markets, Structure and Analysis".

Q. Dr. Murray, would you tell us if you are currently engaged in any research projects of any kind?

A. Yes. I am on half-time research leave from the University to head the Pension Research Project at the National Bureau of Economic Research.

This is the start of the second year of a three-year research project, dealing with the impact of public and private pensions on savings and investment.

Q. Have you any other research interest other than the one you have mentioned?

A. Yes, I am working, gathering materials for a book that I am writing on the capital markets. It is a research activity that ties in very closely with my work at the National Bureau.

I should say that whatever I have to say represents my own opinions in this matter, and I do not speak for the National Bureau of Economic Research.

Q. By way of clarification, Dr. Murray, would you tell us what the National Bureau of Economic Research is, and what it does?

A. It is a private nonprofit economic research organization, which operates under grants from foundations, principally, doing studies basically in business cycles, national income, prices, productivity, and the capital markets, and the saving and investment problems relating to it.

Q. Have you made, or are you presently engaged in any [fol. 641] studies as to the place of equity investments in non-insured pension funds? Or was this included in your previous answer?

A. Yes, this is an integral part of the current research project, but it is a matter that I have been studying for about a decade.

Q. Would you tell us what has been your actual business experience in managing and in advising investment portfolios of institutional investors, including pension funds?

A. My experience with Bankers Trust Company was of course, in part, directly in the management of institutional funds. I also, while there, served for the bank as advisor to endowment funds, property insurance companies, mutual savings banks, life insurance companies, and various kinds of institutional funds.

Subsequently, I have served as a consultant to the Retirement System of the Tennessee Valley Authority and consulted with a fairly wide range of other institutional investors.

Q. Doctor Murray, we have had testimony by Mr. Natrella of the Securities and Exchange Commission as to various existing types of pension funds. In terms of the market for equity securities, which of these pension funds are the most important?

A. I would say corporate pension funds. That is, funds established for the employees of profit making organizations.

Q. Are you aware of any studies or projections that have been made as to how large these funds are likely to be in the future?

A. A number of projections have been made, and I have made them myself from time to time. In my opinion, one of the best prepared and most reliable of these projections is that prepared by Mr. Vito Natrella of the Securities and Exchange Commission.

[fol. 642] Q. Would you tell us how Mr. Natrella's projections compared with other projections that have been made?

A. His projection for a year like 1965 of somewhat over 50 billion dollars of assets in corporate pension funds is lower than a good many projections that have been made.

I, myself, believe that his estimates may be slightly on the conservative side. I also believe that he has been too con-

servative in his estimates of the amounts of pension funds which will be used for the purchase of equity securities.

But, essentially, I think he has prepared his projection very carefully and very soundly:

Q. Doctor Murray, taking the same representative years as Mr. Natrella has taken in his projections, 1960 and 1965, do you have any estimates of the volume of common stock purchases by corporate pension funds for these years?

A. Yes. I estimate that corporate pension funds will be investing one billion, three hundred million dollars in common stocks in 1960, and one billion, six hundred million dollars in 1965.

Q. Doctor Murray, along the same lines, have you made any estimates, as to how much of these sums, these pension funds—not the pension funds—these common stock purchases that you referred to above will be invested in the common stock of General Motors?

A. On the assumption, which I make with considerable confidence, that General Motors will maintain its leading position as a well managed, profitable enterprise, I believe that we may expect pension fund portfolio managers to put one and two-thirds per cent of their common stock money in the shares of General Motors stock.

[fol. 643] This is based on my own observation and also some objective evidence that bears on this point.

Q. Would you elaborate on these observations and this objective evidence that you have just referred to?

A. In my personal observation, I have seen many pension funds investing in the range of two to three per cent of their stock portfolio in General Motors. And in some portfolios the figure runs higher, and in some portfolios it may run lower. But this represents a reasonable consensus of the observed policies of portfolio managers.

But there is some objective factual evidence on this point that I should mention.

In the report which the Superintendent of Banks of the State of New York made on pension and other employee welfare plans, which covered all of the funds administered by New York State Banks, and more than half of all the trustee corporate pension profit sharing and thrift plans, it showed that on September 30, 1954, these New York banks, in the funds which they administered, owned twenty-

seven and one-half million dollars market value of General Motors stock, which represented two per cent of their total common stock investments.

A subsequent study for the Senate Banking and Currency Committee, covering the 34 months which ended in October, 1955, showed that 30 pension funds, holding 50 per cent of all the common stocks in corporate pension funds, made net purchases of General Motors stock amounting to eleven million dollars.

This represented one and two-thirds per cent of their common stock purchases during the 34 months.

So I am using this figure of one and two-thirds per cent [fol. 644] as representative of the known decisions of a large group of corporate pension fund portfolio managers as evidenced by their action taken over a three-year period.

It represents their decisions under a variety of circumstances and conditions affecting stocks generally, and affecting the stock of General Motors in particular.

My own observation confirms, and this objective evidence contributes to this conclusion.

Q. Doctor Murray, in dollars, could you tell us, for these representative years, 1960 and 1965, how much this would indicate in the way of General Motors stock buying?

A. This would mean twenty-one million, seven hundred thousand dollars for 1960, and twenty-six million, seven hundred thousand dollars for 1965.

Q. Have you taken into account the other groups of non-insured pension funds, those of State and local governments and non-profit organizations?

A. No, not in this statement. I would add an increasing amount of buying to take these funds into account. Not over four million dollars for 1960, but at least eight million dollars for 1965.

The totals, then, conservatively calculated, in my opinion, would be an annual buying rate for General Motors of $25,000,000 and $35,000,000 in 1965.

Q. Dr. Murray, were you able to estimate the total volume of General Motors stock that might be purchased by non-insured pension funds for the next ten years?

A. Not with precision, but using these bench mark amounts for 1960 and 1965, one could compute an aggregate market for General Motors Stock between 300 million and 350 million dollars for the ten years 1959 through 1968.

Q. In the broad field of providing retirement income, do you know of any other developments which might add [fol. 645] to the market for General Motors for funds established for this purpose?

A. It seems to me there are two current developments that deserve mention in this connection.

The first is the proposal that legal reserve life insurance companies be authorized to write variable annuity contracts. I believe that Mr. George Johnson has already testified on this.

The second development of significance is represented by the proposed legislation for self-employed retirement tax deductions. Congressman Keogh's bill on this subject has been passed by the House of Representatives, and it provides that self-employed individuals may make tax deductible contributions to restricted retirement funds.

If this bill becomes law, as seems likely, and if the estimates of the Treasury Department are realized, this would represent a substantial additional flow into plans for retirement from self-employed individuals.

The Treasury estimates indicate that the amount that might be set aside under these restricted retirement funds could aggregate seven or eight hundred million dollars in a few years from now.

I have not taken these developments into account in my estimates of a 300 to 350 million dollar market for the next decade.

Q. Dr. Murray, again I think this was brought out by your previous testimony, but would you tell us how General Motors stock ranks in favor among leading common stocks for pension fund investment?

A. At the time of the New York State Banking Department study, that was December 30, 1954, General Motors ranked either eighth or tenth in popularity, depending upon [fol. 646] whether one counts two large holdings of other stocks in profit sharing and thrift plans.

On the same basis, du Pont ranked either third or fifth when holdings of Christiana Securities and du Pont are combined.

The Senate Banking and Currency Committee studied twenty-five representative stocks for the thirty-four months' period ended October, 1955, and in their study, General Motors ranked fifth in the size of net purchases.

To bring this a little closer down to date, the thinking of corporate trustees is indicated by their portfolio policies in the administration of common trust funds, and the survey made by "Trusts and Estates" magazine for September 30, 1958, shows that 194 out of 204 common trust funds reporting owned General Motors.

This was the third highest proportion of holders for any of 271 stocks that were reported on in the survey.

It is clear, I think, that in the past and in the present, General Motors is a highly regarded common stock among professional institutional portfolio managers.

Q. Dr. Murray, to go to a slightly different subject, would you tell us by way of background what is meant by the term "scarcity value", when used in connection with a common stock?

A. This is a term that has received wide currency in recent years as the growth of institutional common stock investing has had the effect of taking more and more shares out of the floating supply, and as these shares have drifted into the hands of long-term permanent holders.

It has been felt by many observers that this constant buying by institutional investors, its reduction in the floating supply, has created a scarcity value for the stocks of [fol. 647] leading industrial corporations, and indeed, there is ample evidence that this has developed in specific instances.

Q. Dr. Murray, will you tell us what effect the presence or lack of a scarcity value in connection with a common stock would have on the market price of that common stock?

A. When there is a genuine scarcity of shares for the needs of portfolio managers eager to buy the stock, the price inevitably is pushed upward as they continue to buy against a relatively fixed supply of shares.

Q. What effect would an increased supply of stock coming onto the market have on a stock issue which had this scarcity value as part of it?

A. It could have an appreciable effect. It could bring the stock out of this scarcity class and put it alongside of a large number of general run of stocks that really do not have any scarcity value.

Q. So the effect would be, if a stock has this scarcity value, the effect of an increased supply would be to cause a market decline in the price of stock?

A. It definitely would.

Q. Dr. Murray, again, based on your studies and your personal observations and your experience, would you tell us whether the purchases of General Motors stock, as described in your testimony, by pension funds and other institutional investors has had the effect of creating a scarcity value in connection with General Motors stock?

A. There has been, in my observation, no scarcity value attached to the shares of General Motors and to the shares of a number of other companies of similar size.

The market value of General Motors, it seems to me, has in the past, and continues in the present, to rest basically on the factors of earning power and dividends. There is [fol. 648] plenty of General Motors stock to go around, just as there is plenty of stock of American Telephone, Standard Oil of New Jersey, or du Pont.

I can illustrate this, perhaps, by referring again to the study of pension funds made by the New York State Banking Department. At that time these pension funds owned .39 of one per cent of the outstanding shares of American Telephone; .36 of one per cent of the shares of du Pont; .30 of one per cent of the shares of General Motors; .48 of one per cent of the shares of Standard Oil of New Jersey.

Even if you treat the shares of General Motors owned by du Pont as not being outstanding, the fraction would have been only .39 instead of .30 of one per cent.

You can contrast this with the fractions which these pension funds owned of other highly regarded stocks, stocks like IBM, Texas Company, Westinghouse, or International Paper. There they owned from about 1½ per cent to 2½ per cent of the outstanding shares.

In other words, anywhere from four or five times the fraction of the outstanding stock of the very large companies.

It is clear in these statistics and in observation of portfolio management practices that the portfolio manager does not enlarge the size of his individual commitment in a company to make it correspond with the size of that enterprise.

The portfolio manager sits down and says, "I am going to put one or two or three per cent of my portfolio in General Motors; I am going to put one, two or three per cent of my portfolio in the XYZ Company." The XYZ Company may be only one-tenth the size of General Motors, but in terms of his own diversification pattern, he will tend to [fol. 649] put a roughly corresponding investment. He may put a somewhat larger amount into the very much larger company, but not in any proportionate sense.

So this means that in the cases of these companies which I have mentioned, American Telephone, du Pont, General Motors and Standard Oil of New Jersey, that the market for their shares must be in the hands of a much larger, broader group of institutional and individual investors.

This means not only that there is not a scarcity value attached to their shares, but in order to bring in this broad list of stockholders, the price must be based fairly solidly on earnings and dividends, the kind of influences that bring in the marginal buyer who, in the final analysis, sets the market price.

Q. Doctor Murray, bringing down these observations and opinions that you have just given to General Motors stock specifically, would you tell us what you think the effects or the impact would be on the market price of that stock if you increased the supply some time in the future?

Mr. Burnham: May we have the last part of that question read?

(Question read.)

Mr. Cox: I object to the question unless the assumption is stated; how much, what period of time.

Mr. Andrews: I do not want to lead the witness. I just want his general——

Mr. Cox: You say increasing supply. One share? Two shares? 64 million shares?

One day? Two days? Three days?

The Court: Do you amend your question?

Mr. Andrews: Yes, I will.

[fol. 650] By Mr. Andrews:

Q. Doctor Murray, are you familiar with the decree that has been filed with this court as to the du Pont holdings of General Motors stock?

Mr. Cowen: You mean the proposed Government decree, counsel? Which decree?

Mr. Andrews: There is only one, to my knowledge.

Mr. Cowen: There are proposed judgments and decrees, five or six, I believe.

The Court: No decree has been entered. I presume you are referring to the proposed decree?

Mr. Andrews: I am sorry. I mean the proposed decree.

By The Witness:

A. Only in the most general way. It is my understanding that the proposed decree would involve, among other things, a sale of about 7 per cent of the outstanding shares of General Motors over a ten-year period.

By Mr. Andrews:

Q. Then, Doctor Murray, as to my question of increased supply, would you relate it to that 7 per cent you just mentioned?

A. I would say that we have evidence that institutional buying has been a stabilizing influence in the price behavior of the shares of strong representative companies, such as General Motors is.

Also, I would observe that the breadth of the market for stocks like General Motors has been increased by reason of institutional investing, by reason of the growing numbers of individual stock buyers, the growing number of system-[fol. 651] atic stock buying programs that have been developed directly by individuals and through investment companies.

I feel, therefore, that in any appraisal of the impact of a 7 per cent increase in the supply of shares over a long period of time, that one must take into account the increasing breadth and stability of the market in which this event might take place.

It seems to me that the actual impact that it will have on price will be determined by the skill with which any such distribution was handled.

But basically, the price of General Motors, in my opinion, will be determined primarily over the years ahead by the performance of the enterprise in maintaining its competitive position and maintaining its ability to pay good dividends.

Mr. Andrews: I have no further questions on direct.

The Court: The Court will recess for ten minutes.

(A recess was taken.)

The Court: Counsel may proceed.

Cross-examination.

By Mr. Cox:

Q. Mr. Murray, do you recall generally your testimony on direct examination that had to do with your projections of the possible demand for General Motors in 1960 and 1965?

A. Yes.

Q. Do I understand correctly that those projections were made simply by applying the factor of 1⅔ per cent to the money that you estimate that pension funds and the other institutions you referred to would have available for investment in equities in the years 1960 and 1965?

A. They were computed by applying the 1⅔ per cent to [fol. 652] the amount which I believe this pension fund group will invest in equities.

Q. Will invest in equities in 1960 and 1965?

A. Yes.

Q. Now, let me ask you again to tell us how you arrived at the 1⅔ per cent factor you applied?

A. I arrived at this, first, as I mentioned, by my observation of the portfolio management policies of a large number of individual pension funds.

Q. Now, may I interrupt you there?

A. Yes.

Q. Give us the names of those pension funds.

A. Always when I have seen a pension fund portfolio, it has been in a confidential capacity. I am not at liberty to mention the holdings of any fund by name, but I can assure

you that, for example, I examined all of the pension funds that are filed in the New York State Banking Department under the New York State Disclosure Act.

Now, these, of course—this is public information; I do not have with me the names of those funds.

Q. You do not have any of those names with you?

A. No.

Q. Can't you remember any of them?

A. Of course, a large number of these are Local No. So-and-So of the Retail Clerks Association, and I did not bring with me any of these, any of my notes on those funds. There are a variety of them. Of course, many of them are multi-employer union funds. Some are, of course, private organizations.

I could mention—if you want me to name a specific fund, I will mention the College Retirement Equities Fund, of [fol. 653] which I am a trustee, and which has bought General Motors on this basis since it was organized in 1952.

Q. You say "on this basis"; what do you mean?

A. A regular allocation of a fraction of the flow of funds into stock.

Q. Have they regularly invested 1⅔ per cent of all the money they invested in equities in General Motors?

A. At times they have invested more and at times they have invested less.

Q. Over what period of time did you observe that practice?

A. I have observed it personally as a trustee for the last two or three years. Prior to that I have observed it from reading their annual reports of the earlier years.

Q. How many earlier years?

A. The Fund was organized in 1952, so it has been going about seven years.

Q. Are their reports public?

A. Yes, those are made public and that is why I feel free to talk about it.

Q. Can you tell us how many of the years that you have observed the operations of that particular pension fund it has invested less than 1⅔ of the amount invested in equities in General Motors and how many years it has invested more than 1⅔ of that amount in General Motors?

A. I cannot tell you precisely. The current practice is

to put two per cent of new money in the automotive industry. The automotive industry investment is divided between General Motors and Libbey-Owens-Ford, with General Motors being the larger current commitment.

I believe in some past years—I know in some past years the proportion has been higher.

[fol. 654] Q. Has that fund ever bought Ford or Chrysler?

A. I believe not.

Q. But is it true, or is it their consistent policy throughout the period of time that you have observed their practices that they put no more than two per cent of new money into the automotive industry?

A. Two per cent is the current figure.

In the past years it was a somewhat higher figure.

Q. Has it ever been lower than two per cent?

A. No.

Q. And have they always invested that amount, whether it is two per cent or less, or more, in more than one company in the automotive industry?

A. I am not certain whether in earlier years they bought Libbey-Owens-Ford.

They bought General Motors from the beginning.

Q. Now that is one company. You do not have available for us the names of any of the companies whose reports you examined in the office of the New York State Banking Department, as I understand it, is that right?

A. That is correct.

I didn't bring that with me.

Q. Then there is another group of companies whose reports you have examined in the past, but which you say you examined in a confidential capacity. You don't wish to disclose them?

A. That is correct. The general tradition, as you know, is that any information about a company's pension plan must come from the company itself.

Q. That rather leaves me in a position where I am unable to verify that part of your testimony, doesn't it, Doctor?

[fol. 655] A. No. I think you could examine any company and ask them what they did in their pension funds.

Q. But I can't verify it through you, apparently?

A. No, not through me.

Q. How many companies of that kind and number were there of these that you examined in a confidential capacity?

A. Well, of course, over the years I suppose I have looked at the pension fund portfolios by the hundreds.

Q. Do you have with you any working papers or computations that show as a result of your examination of these confidential portfolios how you arrived at the 1⅔ per cent figure?

A. Well, I think I explained that I had not, over the years, in examining these portfolios,—I was not doing it with the purpose of appearing here today; so I did not keep track of how much was being bought in individual funds; but, as I explained in my testimony, for this purpose I used the survey of the New York State Banking Department and the study made for the Senate Banking and Currency Committee, which were actual, factual reports of what pension funds had done.

Q. I think perhaps you have put it in a somewhat different light for me now, and I understand it.

Would it be correct to say that the 1⅔ per cent figure rests primarily on the two studies that you have mentioned, and that that, in a general sense, corresponded with your recollection of what you learned or saw when you used to examine these portfolios? Is that what you are talking about?

A. My problem was to try and average mentally on my past and current observations of the rate of General Motors buying.

[fol. 656] Q. Yes.

A. And when you try to think back over a large number of funds, over time, you have a difficult time in computing an arithmetic average. So what I did was to use the more conservative of the two studies, namely, the one for the Banking and Currency Committee, which showed 1⅔ per cent, rather than the 2 per cent figure shown in the New York State Banking Department figure.

Q. Did you actually attempt, Doctor, to make an arithmetical average based on your recollection of your past examination of these portfolios?

A. I did not try to, because when you try—you have in mind a figure of 4 per cent in one fund, of 1 per cent in another, of 3 per cent in a third fund, and a simple arith-

metic average of these percentages would be meaningless; you would have to go back and weigh them by the amount of stock and the size of the funds in each case.

Q. It wasn't really feasible for you to do that on the basis of your past recollection of those portfolios, I take it?

A. It would not be feasible, because I had not, of course, taken notes.

Q. And I take it you didn't try to do that?

A. I did not.

Q. Now let me ask you about these two studies. One of them, you say, was a study that was made by an agency of the State of New York?

A. That is correct.

Q. What was that study, Doctor?

Do you have a copy of it?

A. Yes, I have.

Q. Would you be kind enough to let me look at it?

[fol. 657] A. Certainly. (Document handed to counsel.)

Mr. Cox: Perhaps we had better have this marked for identification, just so that we will know what we are talking about.

This is a document entitled, "Pension and other Employee Welfare Plans, a Survey of Funds Held by State and National Banks, New York State. Preliminary Report by George A. Mooney, Superintendent of Banks, State of New York".

I ask to have that marked for identification only, as defendant du Pont Exhibit 3.

(Thereupon said document was marked du Pont Exhibit 3, for identification.)

Mr. Cox: This was copyrighted in 1955.

By Mr. Cox:

Q. And can you tell us what period of time it covered by the study?

Do you need to look at it?

A. This tabulation that I refer to in my testimony was made up on September 30, 1954, and the securities were valued at market prices December 31, 1954.

Q. Can you find the tabulation in there?

A. Yes. You see it right here, where I have the figure of twenty-seven and one-half million dollars market value of General Motors stock, which represents 2 per cent of the billion, three hundred and fifty-four million dollars of common stocks held by the banks and trust companies of New York State.

Q. Does this table show over what period of time these corporate trustees had bought General Motors stock?

A. This table does not show over what period of time it [fol. 658] was bought. This was, of course, early in the period of stock buying by pension funds.

Q. There is nothing here that I could examine that would show me over what period of time——

A. No. There is a table that shows the size of the pension funds that the banks administered, historically; but this is not really responsive to the question, because it doesn't show, for example, that common stock purchasing, even as late as 1950, was very, very, small.

Q. There has been some common stock purchasing before that, had there not?

A. There had been, but it was in very small amounts; and, of course, the size of the funds was considerably smaller then.

Q. So far as the holdings of General Motors are shown in this table, No. 4, which is on Page 4 of this document, which has been marked Defendant du Pont Exhibit 3 for identification, is concerned, I take it from an examination of the table and from what you tell me—and you have studied it—that it is not possible to tell over what period of time the shares of General Motors referred to were purchased?

A. That is correct. They were largely recent purchases, but the precise timing——

Q. Is there something in the table that tells you they were recent purchases?

A. I beg your pardon?

Q. Did you say that they were largely recent purchases? Is there something in the table that tells you that?

A. The table does not tell you that, but other information does.

Q. In this report?

A. Yes. That is, the aggregate size of the funds meant that the stock could not have been bought in the remote past, because the funds were not in existence then,

[fol. 659] . We note from other evidence, such as the S. E. C. studies, that the policy of buying stocks was relatively new.

Q. You are referring again now to the same dates, a range of dates we talked about a moment ago, I take it—1950, when the purchasing began—

A. That is right, 1951, 1952.

Q. Although there had been purchases before then?

A. There had been purchases on a very small scale, but it really wasn't until the change in the trust law in New York State in 1950 that authorized fiduciaries to put 35 per cent into equities that there was a widespread use of stocks in pension funds.

Q. And there is nothing, I take it, in this table, that would show what times particular pension funds had bought General Motors stock?

A. No. What that tells you is that of all the stock they bought over this relatively recent period, two per cent was in General Motors.

Q. You can't tell whether a particular fund bought all of it in one year or bought its holdings steadily over a period of years from this table?

A. Well, you know that there were 29 different banks.

Q. I am sorry, Doctor, I didn't hear that. Twenty-nine different—?

A. It shows in that table that 29 banks held the 281,000 odd shares of General Motors on that date, so you know that it was distributed among a large number of institutions.

Q. But you don't know when any particular institution bought?

A. No.

Q. Whether it bought it all in 1950 or part in 1950 and part in 1951, and some more in 1952, or whether it had [fol. 660] bought it all in 1953? This table doesn't tell you that?

A. This table doesn't tell you that.

Q. Now, the other study, which I believe you referred to, was a study that was made for the Senate Banking and Currency Committee, is that right?

A. That is correct. This is the so-called Fulbright investigation of institutional investors in the stock market.

Q. And that covered a 34-month period?

A. That is correct.

Q. By the way, before I leave this study of the Superintendent of Banks in New York, these, I believe, referring again to the table on Page 4, these are market value figures, are they not?

A. That is correct.

Q. Of course, they show the market value as of September 30, 1954?

A. I believe it says at the bottom of the page that it is December 31, 1954.

Q. You are quite right, December 31, 1954.

Again, I take it, this table does not show us what the cost of General Motors had been when they were bought by the various corporate trustees?

A. No.

Q. They might have been bought, I suppose, at a higher price or at a lower price?

A. That is correct.

Q. You can't tell from this?

A. You can't tell from this.

Q. Now, the study of the Banking and Currency Committee of the United States Senate, I believe you gave us some figures from that. Could you give us those again, if you please, sir?

A. I said that in the 34-month period, net acquisitions by the selected group of corporate pension funds, net [fol. 661] acquisitions of General Motors, amounted to $11 million.

Q. Do you get that by subtracting the sales from the purchases?

A. That is correct.

Q. In what way did you derive the 1⅔ per cent factor from that?

A. The same pension funds that, as I mentioned, held 50 per cent of all the stock investments of all corporate pension funds, invested a total of $658 million in common stock during the 34-month period, and $11 million is 1⅔ per cent.

Q. Of the $658 million?

A. Of the $658 million.

Q. Now, we do know in this case, as distinguished from the study made by the Superintendent of Banks in New York, that these purchases of General Motors were made in this 34-month period?

A. That is right.

Q. As I understand it, your projection in the future rests on the assumption that purchases will continue to be made up to and through 1965 at exactly the same rate that they were made in this thirty-four month period, is that right?

A. Based——

Q. It is just a matter of arithmetic, isn't it? You just took the 1⅔ per cent, which you got by the method you described, and then applied it to your estimate of the new money that would be invested in 1965?

A. In the——

Mr. Andrews: Your Honor, this is not an objection; however, I do not think the witness stated it was an assumption as such. This was an estimate based on his experience. He took many factors into consideration.

[fol. 662] Mr. Cox: I would be obliged if we can have the testimony from the witness, instead of Counsel.

Mr. Andrews: You are setting forth a statement that you said the witness made. To that extent, I would like to correct you.

Mr. Cox: He can correct me. The witness, I am quite sure, is capable of taking care of himself.

By the Witness:

A. In my own observation, from my knowledge of the portfolio management policies of the managers of these funds, and in the period that I see ahead, I believe that 1⅔ per cent is too low a figure.

However, I thought it would be helpful to support my own opinion and observation with some objective evidence, and here we had a long-enough period, thirty-four months of varying circumstances of all kinds that General Motors was going through, that the stock market was going through, that the portfolio managers were going through, and it seems to me that the study for the Senate Banking and Currency Committee is significant in supporting the fact that my estimate, based on my own observation and knowledge of the field, has the support, the objective evi-

dence that was submitted in this study over a period of time.

Q. Now I am afraid, Doctor, we are back where we were a little while ago. Your own observation is an observation directed to these reports which you don't have with you and some of which I can't see, and which I believe you said [fol. 663] you didn't really attempt to strike an average because you didn't have the material before you when you were doing this.

But is that the process that you are referring to when you say that it was on that basis you reached the conclusion that 1⅔ per cent was perhaps too low? That is a branch of your reasoning that related to what we were talking about a little while ago, isn't it?

A. May I explain to you why this percentage thing is not just as clear as the blue sky outdoors today?

Q. Certainly. I would be obliged to you, Doctor, if you would.

A. When a new fund is organized and it is just started, and the portfolio manager is buying his first group of stocks, perhaps he is buying ten stocks.

Almost inevitably he is going to buy General Motors and he is going to put ten per cent of his money in General Motors.

This is not his long term pattern. As his fund grows, at the end of the first year, he may have 30 stocks. At the end of his third year he may have 50 stocks. At the end of the tenth year he may have a portfolio that encompasses a hundred stocks. This process of broadening the diversification of the portfolio takes place over time.

Now, in a new fund, I could point, if I were at liberty to produce and submit some of these names, I could show you some new funds that had actually ten, fifteen, twenty per cent in General Motors stock. But this would not be conclusive of anything. At the other extreme, in some of the old, well established large funds, we might be down at 1½ or 1⅔ per cent.

Q. You might even have some funds that over a period [fol. 664] of time didn't buy any General Motors stock?

A. That is correct. This is where we see the difference of opinion among investors. We see others who say, "Well, I am going to own du Pont, I own General Motors through du Pont, therefore I won't own General Motors directly." This also enters into the thinking of portfolio managers.

So the percentages devoted to the purchase of General Motors will be a function of the size, the age, the diversification pattern which develops in an individual fund.

Q. I follow you, Doctor. I don't want to interrupt your discourse, but may I just ask a question?

Am I wrong in my impression that that makes it really very difficult, at least in an intellectual sense, to compute an average that has much significance? Am I wrong about that?

A. It is difficult unless you look at all the funds together, in aggregates, as they are seen in the Banking Department study and in the Senate Banking and Currency Committee study. Here, you see, you have got a reasonably large sample of the group, the weighting factor is taken into account in the compilation.

So it is from this kind of a composite study that you get a tremendously good idea of how these different factors balance out.

Q. I follow you there, Doctor. You get a much better idea as to how they have balanced out in the past. That is what you are telling me, isn't it?

A. I am telling you that this is the record that we have through October, 1955, and then, you will recall that I introduced testimony on the survey of common trust funds of 204 common trust funds administered by commercial banks, to indicate that this same attitude towards General Motors persisted today.

[fol. 665] Q. Yes. I think perhaps I didn't make myself clear. I was trying to see if we could reach an understanding that these composite figures that you obtained, these averages, whether they come from the New York study or from the study of the Banking and Currency Committee——

Mr. Andrews: Your Honor, I think this is becoming repetitious. Mr. Cox has asked him in all kinds of manners in six different ways how he got the figures, and the witness stated how he got them.

Mr. Cox: I can understand why Mr. Owens is uneasy.

Mr. Andrews: I am Mr. Andrews.

Mr. Cox: Oh, yes.

The Court: Objection overruled.

By Mr. Cox:

Q. These are things that are based on a past experience, verifiable experience, is that correct?

A. Brought down to date.

Q. I don't mean past in the sense of being remote, but I mean past in the sense that it doesn't have to do with the future.

Now, the simple question that I want to put to you, Doctor, is if you apply those percentages to a future date, you must necessarily assume, must you not, that these institutions will buy in the future at the same rate as they have bought in the past?

A. Are you speaking now of the fraction of stock money devoted to General Motors stock?

Q. Yes.

A. You will recall that my assumption was that if General Motors maintains its position that it has maintained over the years and maintains currently, of leadership in this industry, profitability, its satisfactory performance in earnings and dividends, the answer is yes, I believe that [fol. 666] portfolio managers will, as they have been, and as they are currently, be satisfied to allocate this sum to the purchase of General Motors stock.

I believe that because the stock is useful and serves their investment purposes, that they will continue to do likewise in the future.

Q. They will continue to buy in the future in the same or at the same rate as they have bought in the past?

A. That they will do this, whether they buy more or whether they buy less, it is my contention, depends on how General Motors performs as a company.

Q. Well, then, when you take a 1⅔ per cent factor and apply it to the future, I take it from your previous answer you are assuming that the performance of General Motors and its status in the eyes of these investors will remain in the future as it has in the past?

A. That is correct.

Q. And for that reason they will buy at the same rate or in proportionately the same amounts, it that right?

A. That is right.

Q. That is what I wanted to find out. It took us a long time, but I am grateful to you.

Now, when you made these projections through 1960 and 1965, did you make any other assumptions? Did you think any other assumptions were necessary except the assumption that you have stated about the performance of General Motors?

A. I am not quite sure that I understand your question.

Q. Let me try it another way.

Do you know, in terms of offering price or market value, how many new equity securities were offered on the [fol. 667] market in the 34-month period that is covered by the study of the Senate Banking and Currency Committee?

A. You are talking about new issues offered?

Q. Over all.

A. Over all, in that period?

I can look it up here.

Q. I don't want to put you to that bother now. Let me ask you this question: In your experience with the managers of these pension fund portfolios, do they pick and choose among different equity securities depending on what is in the market when they are determining whether to make an investment?

A. Yes, they are picking and choosing, although this is not a capricious operation.

They are running a fund, a real long term fund. You expect to be investing, well, as far ahead as you can see, 20, 30 years. So what you are trying to pick out are companies in which you have confidence over a period of years, and then you, in terms of plain mechanics, put down that for every dollar of new money you are going to keep right on buying this list of companies until such time as, on the basis of your reappraisal of the companies' performances, you see some reason either to remove this company from the list or to add that company to the list.

Q. Would the attitude of these managers be affected by the amount of competing securities that are available on the market?

A. Well, obviously, they are looking at the field all the time and if a new company's shares—let's say we had the Upjohn Company that offered its stock to the public for the first time—pension fund managers are going to take a look at the Upjohn Company and decide whether they want to buy this or buy some other drug company's stock.

[fol. 668] This kind of comparison is always done, yes.

Q. Then let me ask you this: in making your projections, did you make any assumption about what other offerings of equity securities would be in amount in the year 1960?

A. I did not make an assumption as to what that volume would be. My basic assumption always is consistent throughout that General Motors as an enterprise will compete successfully for the industry's dollar on the basis of its performance.

Q. Without regard to what order securities are available?

A. Well, I do not mean to inject a personal opinion here and get into my role of a security analyst, but if you look at the record, here is a company that in terms of return on investment on the average over the years has been positively outstanding, and there are very few companies that can compete in terms of performance in this crucial test on return on investment with General Motors over the years.

I am confident on the basis of the demonstrated capacity of this enterprise, that they will be able to take care of themselves very nicely, thank you, in competition with—name it for yourself, whatever new enterprise you want to assume is going to come over the horizon.

Q. Do I understand from that answer, Doctor, that you mean that it does not make any difference in your judgment what other securities may be offered in the market, or what rate of return they may pay, or anything of that kind, that that will not affect the amount of stock that these pensions will purchase of General Motors?

A. All I am saying—of course, if you want to assume more competition for the pension fund managers' dollar, [fol. 669] fine, I will go along with that assumption.

All I say is that the outcome of the competition of General Motors as an entity against one, one hundred, or a thousand other enterprises is a competition in business management.

Q. I understand that.

A. And I believe, and I think the evidence before all of us in terms of the company's performance, is that General Motors can meet this kind of competition.

Q. Well, that is your judgment now based on the past, and I am not quarreling with you over that, Doctor, but what I am trying to find out is whether, in your opinion, in the future the pension fund managers when they are about to make that judgment will be at all influenced by the

presence or absence in the market of other securities, attractive rates of return, and in security companies that have attractive prospects, will they consider that fact? That is what I am asking.

A. Well, certainly they are going to be looking at the whole field of investments and they are going to go through the analytical procedures of security analysis, and they are going to stack up General Motors against all of these other alternative investments.

Q. Now, let me ask you this question: In your projection did you assume that in comparison with other companies with common stocks that are available on the market, General Motors would be in substantially the same position in 1960 and 1965 as it was in the 34 months covered by the study?

A. Your question is, did I assume that they would earn and merit the same place in the eyes of investors?

[fol. 670] Q. That is right.

A. And my answer is yes.

Q. That was your assumption in making the projection?

A. Yes.

Q. Did you consider in your study of this table prepared by the Senate Banking and Currency Committee whether there were any special circumstances in the 34-month period covered that might have affected the stock of General Motors and made it more attractive?

A. Well, in that period we had, of course, a very good automobile year. I do not know whether the old traditional automobile cycle of three years has been repealed or not.

Sometimes it looks as though it was still with us, and sometimes it looks as though it had been modified.

By and large I would say that we were entitled to expect that over any three-year period in the automobile business some years are better than others.

Q. '55 was a very good year.

A. '55 was a very good year.

Q. We have not had as good a one since, I believe, isn't that right?

A. Actually, I think the study shows, though, the purchases in—let's see, the third quarter of 1955 were the smallest for the whole period.

The purchases were much heavier before the boom year than actually when the boom was at its peak.

Q. Well, of course, the automobile year does not exactly correspond with the calendar year, does it?

A. That is correct.

Q. And there were quite heavy purchases earlier in the year of 1955, to my recollection?

A. Yes, fairly heavy, although they were still not—I guess one of the biggest quarters was the third quarter, or the second quarter of '54.

[fol. 671] The biggest net purchases, I guess, were actually in the second quarter of '54, almost as high as in the fourth quarter of '54.

Q. But the automobile year normally starts in the preceding year?

A. That is right, model year.

Q. And the prospects of the industry are frequently appraised for the last quarter or last two quarters of the preceding year, that is right, isn't it, Doctor?

A. Very often. Year end is the usual open season for forecasting on it, at least.

Q. Did you make in your projections, Doctor,—did you make any assumptions in this period through 1965, in respect to any changes in the structure or economics of the motor car industry?

A. Specifically, in the economics of the automobile industry I did not. As I have said repeatedly, I made the one basic assumption on the performance of General Motors and this I have to make because if I cannot use this as a fix, I haven't got anything at all to tie to in trying to appraise the problem.

Q. Yes, I understand that, but you did not attempt to predict through 1965 whether the consumer would continue to spend as much of his money for motor cars as he had in the past, or did you?

A. In my appraisal and the appraisal that other investors are making of General Motors, obviously, this is one of the elements.

Q. Well, did you make an assumption about that?

A. For this particular purpose?

Q. Yes.

A. I did not.

[fol. 672] Q. All right. Did you assume for the purpose of this projection that the position of General Motors in

terms of percentage of cars produced in the country would remain about the same throughout the projection period as it is today?

A. In the same general range as it has been in the last several years, yes.

Q. What range did you use for that assumption?

A. Oh, from the low '40s to the low '50s.

The Court: The Court will recess.

(Whereupon a recess was taken in the above-entitled case until 2:00 o'clock p.m. of the same day, Wednesday, February 25, 1959.)

[fol. 673] Before Hon. Walter J. LaBuy, Wednesday, February 25, 1959, 2:00 o'clock p.m.

Proceedings resumed pursuant to recess.

Present: Same as before.

The Court: Proceed, please.

Roger F. Murray, a witness called on behalf of the Government, having been heretofore previously duly sworn, resumed the stand and testified further as follows:

Cross-examination—(continued).

By Mr. Cox:

Q. Doctor Murray, I am going to give you back your pamphlet from the Superintendent of Banks of the State of New York.

A. Thank you.

Q. Doctor Murray, I have before me the stenographic transcript of this morning's proceedings. I am going to hand you a copy of that transcript and ask you to look at a passage on page 1097 and 1098, which contains one answer and one question, and then a longer answer that you gave at the end of your direct examination.

Will you just look at that and read it to yourself?

A. (Witness complies.)

Mr. Cowen: Does your Honor have a copy of the transcript?

The Court: No, I do not.

[fol. 674] Mr. Cowen: Here is one, your Honor.

The Court: What page is it?

Mr. Cox: 1097 and 1098.

By Mr. Cox:

Q. Have you read that passage?

A. Yes, I have.

Q. Doctor Murray, have you read the actual text of the proposed plan which has been submitted by the Government to this court?

A. I have not.

Q. Now let me direct your attention to your first answer in the middle of Page 1097, in which you say "It is my understanding that the proposed decree would involve, among other things, a sale of about 7 per cent of the outstanding shares of General Motors over a ten year period."

Now permit me to ask you this question: Did you also understand that the plan provides that during this same ten-year period, approximately 4,380,000 shares of General Motors would be distributed annually, prorated to more than 100,000 shareholders of du Pont, in addition to the stock that was to be sold?

Did you understand that?

A. Yes, I understand that to be the case.

Q. Now in giving the answer which appears on Page 1098, did you take into account whether the stockholders of the du Pont Company, to whom this stock would be distributed, 4,380,000 shares each year, would be required to pay taxes on those distributions?

A. I did not specifically take this under consideration, because of the uncertain status, as I understand it, whether this will be taxed, in fact, as ordinary income or whether, as proposed in the Frear Bill, it would not be so taxed.

[fol. 675] Q. So you didn't take that problem into consideration because of the uncertainty?

A. My own feeling is that it would be a serious inequity to have the stock taxed as ordinary income, and on the basis of the precedent set in public utility holding company dissolutions, it seemed to me inevitable that the Frear bill, or something like it, would be passed.

Q. Whatever it may be in law, so far as the intricacies of the tax law are concerned, it is an economic fact that this tax is a kind of tax on capital, is it not? It is a return of capital?

A. It certainly seems to me that this is a return of capital and that the basis of the original investment in du Pont should be spread to the separate holdings of du Pont in General Motors in this kind of a spinoff.

Q. So would it be accurate to say, insofar as you made an assumption, it was an assumption that in one way or another these distributions would not be taxed as ordinary income?

A. That is my basic assumption, yes.

Q. May I direct your attention to the particular sentence in your answer on Page 1098 where you say, "It seems to me that the actual impact that it will have on price will be determined by the skill with which any such distribution was handled."

Do you see that?

A. Yes.

Q. Is there some class of persons or some profession you had in mind that would have the skill to handle this kind of transaction you have described in your answer?

A. Yes. I had in mind the group of experienced individuals engaged full-time in the underwriting and marketing and distribution of securities.

Q. Well-known security underwriting firms, who engage [fol. 676] in this kind of thing as a profession?

A. That is correct.

Q. Let me ask you this question also, Dr. Murray. Did you consider, in formulating this answer, that this amount of stock had to be sold, the sales had to be completed within the ten-year period?

A. Well, you see, I had not studied the decree in detail, and I am not clear on what the precise requirements might be.

What I assumed was from my general understanding, and it was that it was contemplated that whoever had the assignment of liquidating this stock would have reasonable flexibility; and, of course, a ten-year period is affording a significant amount of flexibility. I have no particular opinion as to whether ten years is too short or too long, or anything of that kind.

I emphasize, in expressing my opinion, that the result of this sale, how it actually turns out, in point of fact, will depend on the skill and ability of those who handle it; and, obviously, they must have enough time, and they are the ones who should tell you what "enough time" is, or tell the Court, rather, what they think "enough time" is rather than I, in order to exercise this kind of skill, flexibility and judgment that is required in handling this security distribution or any other security distribution.

Q. You would defer to the judgment of the investment bankers on that point, in other words?

A. I would.

Q. Would you also defer to their judgment on the practical problems and other problems that might be involved in an offering of this kind?

A. You mean practical problems such as after market distributions or sales blocks? I would defer to their judgment.

Q. And their judgment as to the price at which you might have to offer the stock in order to move it on the [fol. 677] market?

A. Yes, I am not experienced, have not been an investment banker or security distributor, and I would not consider myself qualified to give worthwhile opinions on those points.

By Mr. Bushby:

Q. Doctor Murray, Mr. Cox referred to the distribution of some four million odd shares of General Motors stock to stockholders of du Pont every year for ten years during this same period.

You said you assumed that they would not be taxed as ordinary income.

Of course, if they were taxed as ordinary income, there would necessarily be widespread sales by the taxpayer, would there not, to raise money?

A. That is correct.

Q. Now those sales could not, of necessity, have the kind of skillful management which you have referred to, could they? They would be individual sales by scattered people. There would be no manager of a syndicate or there would be no syndicate, is that correct?

A. I presume that some large holders might make arrangements to market their shares in blocks, but——

Q. The average.

A. As far as the individual small stockholder is concerned, that would be true.

Q. Do you think that such sales would have an effect on the market price?

A. This is the problem of meeting a tax bill on a specific date. Obviously, it gives the seller less flexibility if he has to sell to pay the tax than if he is making simply an investment transaction where he has more time and can act when market conditions are more favorable.

[fol. 678] Q. Your answer, then, is that it would depress the market? That such sales would depress the market?

A. I think you have to distinguish in looking at this problem, it seems to me, between short run temporary kinds of impacts that may be created by forced selling of any kind.

That is the same kind of forced selling that occurs every day. When a large stockholder of General Motors dies, his estate immediately has to liquidate a lot of stock in anticipation of estate taxes.

This kind of forced selling is taking place every day in the market in every one of these securities, and it may have a temporary impact on the market.

This is where I come back, I think, again, to the breadth of the market for General Motors stock or for American Telephone or these other stocks that I have mentioned.

They are much better able to stand temporary shocks, if you will, caused by, maybe, poorly timed, maybe ill advised sales of shares. But this, as I say, is, of course, what happens all the time.

Q. But if the distribution of these shares is taxable, that volume of shares will be added to what you said is the current absorption in the market of sales caused by deaths, and so on, isn't that so?

A. This is so, although the market mechanism is compensating, and if these tend to reduce the price lower than it otherwise would have been, the stock, of course, is by definition more attractive to potential buyers.

So that institutional and other investors may be perfectly willing to step up their purchases. So that you are not dealing with a static demand for General Motors stock.

It is always demand at a price in relation to earnings and [fol. 679] dividends, and this demand will be obviously stronger at a lower price. The stock will be more attractive to the institutional type of investor, which I have been discussing.

Q. But, sticking to the point here, these sales, if they take place, will not be handled with the skill to which you referred in your original answer. They will not be syndicated sales?

A. A large part of them will not, that is correct.

Q. Do you think it would make a difference whether these compulsory sales or voluntary sales by stockholders take place at a time when the market generally is rising or when it is declining? Do you think there would be a difference in their effect?

A. I would say that it makes a difference. The primary difference is not necessarily any overall market trend, but rather how is General Motors doing? Obviously, if General Motors is having a good year earningswise, and has a good year in prospect, such selling, if it is necessary—and of course this is all hypothetical as to whether it will be required——

Q. No. The compulsory sales would be compulsory. The two million share sales would be compulsory every year for ten years.

A. Well, as I say, I have not studied the decree.

Mr. Andrews: Your Honor, I have an objection to the question put to the witness by Mr. Bushby. This is not the Government's position and I object to the question.

Mr. Bushby: That is the way it was filed.

Mr. Andrews: We filed a brief subsequent to the proposed decree explaining our position, and it is clear that that was not our position.

[fol. 680] The Court: Counsel is discussing the provisions of the decree rather than the brief, I presume?

Mr. Bushby: I think so.

The Court: Proceed.

By Mr. Bushby:

Q. Assume that these sales have to take place, two million shares a year over a ten-year period, and that these sales are compulsory. Do you think it makes any difference

at the time of such sale in any one of those years whether General Motors is on the decline or is moving up?

A. I say, of course it makes a difference how the business and the earnings of General Motors are, and how they appear to be in prospect, how the automobile business is, and how many of their other diversified activities are doing from a profit and volume standpoint.

Q. Do you think it makes any difference what the general market is doing?

A. In some respects, it does condition the environment, but basically we know that we have wide ranges of fluctuations of individual stocks in all kinds of markets.

Q. Let me ask you this question: you say it is just as easy to market this two million shares at a time when the general market is declining as when the general market is going up and strong?

A. What I say is it may not be. Obviously, if the general atmosphere is one of pessimism as reflected in a generally declining market, it is harder to sell any stock, but the primary condition will be——

Q. Just let me have that for an answer at the moment. Do you know that there have been several severe declines [fol. 681] in General Motors over the last ten or twelve years?

A. Yes.

Q. Do you know how extensive those declines have been?

A. In general terms, I couldn't give you the figures.

Q. Do you have any memory as to the extent of the time of those declines?

A. Oh, I can recall in rough terms what some of them have been, perhaps.

Q. Taking one of those periods when General Motors declined as much as 30 per cent, do you think one of these sales could take place easily during such a period?

A. Well, it is always relative. You ask me can it take place as conveniently when it is declining as when the market is rising. My answer is obviously it is not.

Q. Right. Do you know whether or not large offerings of General Motors stock in recent years have depressed the market price?

A. If you take short-run periods, you may be able to point to the fact that there have been temporarily depressing

effects by large offerings of stock. On the other hand, when you look at these things over any reasonable length of time——

Q. What do you call a reasonable length of time?

A. A year, two or three years.

Q. They have had no effect?

A. The effects have been hard to find.

Q. Now, you said that the basic factor here in the market is the maintenance by General Motors of its earnings and its competitive position in the industry, in the several industries in which it is engaged. Now, to maintain such a position, does not a company have to have frequent equity financing, that is, financing through stock and not debt?

A. From time to time, as General Motors has made use of.

[fol. 682] Q. The answer is yes, it does have to have that to keep its competitive position, is that correct?

A. Yes, which it may gain either by the direct offering of equity securities or securities convertible into stock.

Q. One way or the other?

A. That is right.

Q. Do you think that these compulsory sales, and, if they take place, these voluntary sales of the four million shares a year for ten years are going to interfere in any way with equity financing by General Motors?

A. I do not think really seriously, when we talk about a period as long as ten years. But, remember, I am not representing myself as an investment banker or an expert in the marketing of securities.

Q. You defer to their judgment on whether it would interfere or not?

A. Well, I say this: I am prepared to talk about, as I have, the characteristics of the market for General Motors stock, and the characterization which I have made, and which I am perfectly prepared, I think, and qualified to talk about, is that this is a market of extraordinary breadth in which the institutional buying plays an important stabilizing role.

Q. Coming back to this maintenance of General Motors competitive position, do you think a grand jury investigation of General Motors by the Government, looking towards a dismemberment of General Motors would help it maintain its competitive position in the industry?

A. I am not familiar with what is involved in any such action, and therefore I could not say.

Q. Do you know whether or not there is such a grand jury investigation?

A. I had no notion that there was a grand jury investigation. I do not know that.

[fol. 683] Mr. Bushby: That is all.

Mr. Andrews: I have a few questions, Doctor Murray.

Redirect examination.

By Mr. Andrews:

Q. I think Mr. Cox on cross-examination asked you what effect would the fact that automobiles might decline in sales in the next ten years have on your opinion? Are you aware of the fact that General Motors is a highly diversified company?

A. Yes, I am.

Q. Would you tell us some of the products they manufacture, other than automobiles?

A. Of course, they have had the diesel engine business for many years. They have earth-moving machinery. They have the Frigidaire Division and manufacture electrical appliances.

They make aviation engines through the Allison Division. It is a broad range. I am sure I have not even begun to recall all of their many aspects.

It has a sales finance subsidiary as well.

Q. Do you have an opinion, Doctor Murray, as to whether this diversification by General Motors has confributed to their success?

A. In my opinion, it very definitely has.

Q. Was this an important consideration when you stated that you assume that General Motors would continue to be as successful as they have been?

A. Yes.

Q. Dr. Murray, I would again like to refer to some of the questions put to you on cross-examination as to your opinion as to what would be the market impact on General Motors stock by the marketing of the General Motors stock held by du Pont.

[fol. 684] I would again ask you, is it still your opinion if these trustees, who would consist of underwriters or whatever financial experts they may be, were given enough flexi-

bility and enough freedom of action during this ten-year period, that the sales operation could be done successfully?

A. I feel definitely that it could.

I think it is very important that they have flexibility, and that those who handle it, of course, be thoroughly skilled in all areas of the market mechanism for the distribution of securities. This is a marketing problem that requires the best professional talent that can be found.

Q. Dr. Murray, if I stated even further that these financial experts, these trustees, were free to defer the sale of this General Motors stock for any period of time in which they thought the market could not absorb it, would this strengthen your opinion in regard to the successful selling?

A. Oh, absolutely.

Q. If I would add further, Dr. Murray, that if these trustees within this 10-year period thought that it still could not be done, and they could come into the Court and ask the Court to give them more time to do this, and they could go beyond the 10-year period, would this further strengthen your opinion that it could be done successfully?

A. It certainly would.

Mr. Cox: Are you assuming in that question that the Court would grant that permission?

Mr. Andrews: No. I said if this was so.

Mr. Cox: Yes, and if you don't mind, what I am trying [fol. 685] to find out is, what is so. They come into Court and apply, and do they get permission or not?

Mr. Andrews: Well, your Honor, I think we have filed the decree with the Court and written a memorandum as to how we think the decree should be interpreted. Perhaps at the conclusion of the evidence, we may come up with another decree, having other provisions. I think I have a right to put these questions to the witness.

The Court: I didn't understand that there was an objection. There was merely an inquiry.

Mr. Cox: An inquiry, yes.

Mr. Andrews: I am just adding considerations as to how this would affect his opinion.

Mr. Cox: Yes, but as I understand, the question involved only an application to the Court and not action by the Court. On that basis, let the witness answer.

By the Witness:

A. Well, obviously——

By Mr. Andrews:

Q. I asked if the Court were convinced that the trustee needed this additional time, if the Court would grant it to them, if this degree of flexibility——

A. If it were provided that on a showing of important persuasive evidence that there should be an extension if the Court would then grant it on that basis, my answer is definitely yes, because this would again enlarge the scope of the group charged with this marketing problem.

Q. I see. Dr. Murray, referring to this per cent that you applied to what you estimated to be common stock pur-
[fol. 686] chases of pension funds—I think it was 1⅔ per cent.

A. That is right.

Q. Now, in deriving your estimates of the amount of General Motors stock which will be purchased by pension funds during this period, did you just merely apply this 1⅔ per cent to get this amount, or did you also take into account the investment policies of these various institutional investors, how they have conducted their investments in the past, and how you estimate they would do it in the future?

A. I took into account my knowledge of the investment policies and objectives of the pension fund and other institutional portfolio managers, and the fact that General Motors, as it is today, is a medium of investment responsive to their investment needs.

These investment needs do not change over time. The problem of investing a pension fund is the same problem this year, next year, and the year after.

So I say that as long as General Motors continues to offer this kind of an investment opportunity that the pension fund manager and the other institutional purchaser is seeking, the transactions will take place.

Q. One further question, Dr. Murray. Regardless of how this distribution of General Motors stock to du Pont stockholders would be considered in economics, whether they regard it as a capital levy or not, are you aware of the fact that Congress through its tax laws has said that it is income?

Mr. Cox: Have you qualified the witness as a tax expert?

Mr. Andrews: Well, you asked the witness if it was a capital levy. I am asking if he is aware of the facts.

[fol. 687] Mr. Cox: I was asking about economics. You are asking about a tax law. We have a ruling from the Bureau of Internal Revenue.

Mr. Andrews: They say it is income.

Mr. Cox: They say it is income.

Mr. Andrews: I have nothing further.

Mr. Cox: I have one question, Doctor.

Recross-examination.

By Mr. Cox:

Q. My question has to do with the questions you were asked on redirect about the exercise of skill by the trustee or by the investment banker. Now, I take it from your answers, from your point of view, to give that skill and discretion full play it would be better to have no time limit at all; they could then choose their own time?

A. Well, to me the value of setting some kind of a time is that you give them instructions to get on with the job. It means that if they see a good opportunity they face up to it and they get it done.

Q. You could accomplish that, could you not, without fixing a time limit?

A. Well, it is pretty hard. I suppose you would just have a continual discussion back and forth—"Haven't you sold any stock yet?", and that sort of thing.

Q. But the more elasticity they have with respect to time the better job they will do?

A. That is right.

Q. And if they have no rigid time limit they will do a better job than if they do?

A. Well, of course, I feel—you see, how much time they will actually need nobody really knows at this point. It could happen that most favorable from the standpoint of distribution, you get off into a roaring bull market in which [fol. 688] all automobile stocks are favored; they sell the whole block of stock in six months, but, on the other hand, conditions might be quite different.

Q. It might take them longer than ten years?

A. It might take them longer than ten years.

This is why in response to the question, "Should an opportunity for an extension be granted, would this be favorable in terms of your expectation that this marketing can be accomplished?"

Of course, I have to say yes.

Q. Anything that gives them a wider degree of choice as to time is advantageous?

A. That is correct.

Mr. Cox: All right. That is all.

Mr. Bushby: No examination, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Owens: The Government calls Jack Morgan.

Mr. Bushby: Did we have notice of this witness?

JACK MORGAN, a witness called on behalf of the Government, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Owens:

Q. Would you state your full name, sir?

A. Jack Morgan.

Q. And your address?

A. 114 North Pine, Mount Prospect.

Q. What is your business connection, sir?

A. I am comptroller of the Sears Savings and Profit Sharing Pension Fund of Sears Roebuck & Company employees.

Q. How long have you served in that capacity?

A. A little over a year and a half, sir.

[fol. 689] Q. Would you tell us what your duties are in your capacity as comptroller of the fund?

A. We prepare the reports pertaining to withdrawals from the fund and also maintain the general ledgers.

Q. So that the business records relating to the fund are under your immediate control and supervision, is that correct.

A. Yes, sir.

Q. And do you have a staff of people that work under your direction in handling those business records?

A. Yes, sir.

Q. How long have you been with the company, Mr. Morgan?

A. About 18 years, sir.

Q. 18 years?

A. Yes, sir.

Q. And would you tell us if you have had a background in the accounting field, sir?

A. Yes. I am a graduate of the University of Iowa; I majored in accounting, and have spent 16 years, approximately, in the retail stores of Sears Roebuck.

Q. Now, would you state the exact title of the fund, please?

A. The Savings and Profit Sharing Pension Fund of Sears Roebuck & Company Employees.

Q. When was that fund started, sir?

A. In 1916, sir.

Q. And would you tell us what the requirements are for eligibility as a member of the fund?

A. An employee must be a member or an employee of the company one year; then he is eligible to join the fund.

Q. So then it is a voluntary plan?

A. Yes, sir.

Q. And what percentage of your eligible employees are actually members of the fund?

A. I would say approximately 98 per cent, sir.

[fol. 690] Q. Would you tell us how the contributions to the fund are made first by the employees?

A. The employee is permitted to deposit five per cent of his salary each year, not to exceed $500, as credits to his account in the fund.

Q. Is there a contribution by the employer to this fund?

A. Yes, sir.

Q. And what is the employer's contribution?

A. The employer's contribution is based upon a graduated scale, varying from five to ten per cent of the company profits before taxes.

Q. And what is the dollar figure of profit at which the employer's contribution begins?

A. May I refer to the notes, sir?

Q. Yes, sir.

A. Reading from the Rules of the fund or the plan:

"Namely, five per cent of the consolidated net income amounts to 50 million or more, but less than 100 million; six per cent of the consolidated net income amounts to 100 million or more, but less than 150 million; seven per cent of the consolidated net income amounts to 150 million or more, but less than 175 million; eight per cent of the consolidated net income amounts to 175 million or more, but less than 200 million; nine per cent of the consolidated net income amounts to 200 million or more, but less than 250 million; and ten per cent of the consolidated net income amounts to 250 million or more."

Q. So then, in summary, the employer's contribution varies between 5 per cent, starting at net profit before taxes, of 50 million, to a maximum contribution of 10 per cent, where the net profit before taxes is 250 million?

A. Yes, sir.

[fol. 691] Q. Is that accurate?

A. Yes, sir.

Q. Now would you tell us when the employees' interest in the fund becomes fully vested, sir?

A. After five years of service with the company.

Q. Would you explain what "fully vested" means?

A. "Fully vested" means that the employee, should he leave the service of the company, would have the privilege of taking his cash and miscellaneous investments or his Sears' stock, in kind, at the time he leaves.

Q. Would you tell us in what way the value accruing to the employee as the result of his deposits and the employer's contributions is carried on the books or in the accounts in favor of the employee?

Mr. Tierney: Just a moment.

If the Court please, I object to the materiality of this testimony, and to the question as to how this profit-sharing plan is operated.

The Court: Will you explain the materiality, Counsel?

Mr. Owens: We will go into, your Honor, the extent of the assets of this fund in connection with the potential purchasing capacity of this fund, like other pension funds, your Honor.

Mr. Tierney: If he gets to that point, all right; but as to how it operates—and even if it gets to that point, we will want to object; we have a general objection to that.

But as to what percentage the employees put into this savings plan and how much the company puts into the savings plan, I can't see where that is material.

The Court: I don't think those details are material.

[fol. 692] By Mr. Owens:

Q. What are the current assets at market value of the fund?

A. May I refer to my notes?

Q. Yes. If you have something to refresh your recollection, you may.

A. The current value of the fund on the tentative balance sheet basis for the total assets is approximately 1 billion 250 million, as of today.

Q. Do you know how that ranks among corporate pension funds, sir, in size?

A. I understand it is Number 3, sir.

Q. Would you tell us, sir how the investments of the assets of the fund are determined or by whom they are controlled?

A. The Trustees of the fund, sir.

Q. Pardon?

A. They are determined by the Trustees of the fund.

Q. And do they have an investment policy committee?

A. They delegate the function of carrying out the policy to an investment committee.

Q. Now can you tell us, sir, what the three sources of income in any year are to the fund's total assets?

A. They include employee deposits, company contributions, and fund earnings, which include dividends and interest.

Q. So that the total of those three, less payout is the amount that is available for investment, is that correct?

A. Yes, sir.

Mr. Owens: I will ask the reporter to mark for identification Government Exhibit No. 168.

(Thereupon said document was marked Government Exhibit 168 for identification.)

[fol. 693] By Mr. Owens:

Q. Do you have a copy of this document, Mr. Morgan?
A. Yes, I do.

Q. Was this Government Exhibit No. 168 prepared from the business records of the fund?
A. It was, sir.

Q. Was it prepared under your direction?
A. Yes, sir.

Q. Does it accurately reflect the figures as they appear on the business records of the corporation?
A. Yes, sir.

Q. Now I note on Government Exhibit 168 for identification—which, for the record, I would like to identify as the "Savings and Profit Sharing Pension Fund of Sears Roebuck & Company employees—Summary of Assets, 1949 through 1958"—I note the first heading at the left of that document, sir, is the total, "Assets at Cost."

Would you tell us what that is, sir?

A. That is the amount paid for the assets we acquire, as shown in the schedule below.

Q. So that is the cost to the fund of acquiring the various categories of assets that are listed in the column at the extreme left, is that correct?
A. Right.

Q. I note that at the total of that column is an entry, "Total Assets at Cost."

That has grown from the picture at the end of the year for 1949 from 190,303,000 to some 596,937,597.

Mr. Bushby: I object to counsel reading from an exhibit. We can read, too.

It hasn't been offered in evidence, anyway.

Mr. Cox: May it please the Court, if Mr. Owens will offer the exhibit in evidence, I don't intend to object to it. And perhaps we can save some time.

[fol. 694] The Court: Yes. The document speaks for itself.

Mr. Bushby: I object your Honor, unless it is shown that there is some relationship to General Motors stock.

Mr. Tierney: I object to it also, as we have heretofore to similar exhibits.

This has no relation to General Motors stock.

Mr. Owens: This has a relation, if your Honor please, to the asset picture of these pension funds, and a relation to their status as a market potential for the General Motors stock, which would be divested under the Government's decree.

Mr. Bushby: I would like to ask the witness a question on this before your Honor's decision on its admissibility.

The Court: You may.

Cross-examination.

By Mr. Bushby:

Q. Mr. Morgan, has this fund purchased General Motors common stock?

A. Not that I know of, sir.

Mr. Bushby: I renew my objection, your Honor.

Mr. Owens: If your Honor please, we are not talking now about the existing holdings of this fund, but what it represents as among other pension funds in terms of potential. I intend to develop the picture of this investment fund with respect to its investment and securities, equity securities, from this document, and elicit testimony from the witness in that connection.

Mr. Bushby: We certainly don't object to that, if you are not interested in General Motors, sir.

The Court: Is it being offered?

Mr. Owens, Yes, your Honor.

The Court: It is received.

[fol. 695] (Said document, so offered and received in evidence, was marked Government Exhibit 168.)

Direct examination (continued):

By Mr. Owens:

Q. Mr. Morgan, directing your attention to the entries on this document in asset values, in terms of book values, and further, to the heading, "Miscellaneous Preferred Stock,"

"Miscellaneous Common Stock," and "Sears Stocks," would you tell us, if you can, what per cent, on the basis of book value, the interest in those three equities, that is, Sears stock, miscellaneous common stock, and miscellaneous preferred stock, is of the total for the year 1955?

A. Approximately 62.2 per cent of the total assets.

Q. Pardon?

A. Total assets at cost.

Q. And for the year 1956, sir?

A. 61.7 per cent.

Q. And for the year 1957?

A. 69.11 per cent.

Q. And for the year 1958?

A. 73 per cent.

Q. So there has been a steady increase, has there not, in the percentage of the total of the fund's assets at book value that has been invested in equity securities?

A. Yes, as pointed out in the exhibit.

Q. Now I understand that the fund has a considerable amount of its equities in Sears stock, is that correct?

A. Yes, sir.

Mr. Tierney: Will you explain what you mean by "considerable," counsel?

By Mr. Owens:

Q. Would you tell us what the per cent of presently out-
[fol. 696] standing is of Sears, as a percentage of the total—Sears stock, as a percentage of the total assets?

Mr. Bushby: There are two different questions there, and I object to it.

They are completely mixed up—what per cent of this fund is in Sears and how much outstanding stock is in this fund.

What is your question now? I can't understand it.

By Mr. Owens:

Q. The percentage of this fund's assets that it in Sears stock at book value for the year 1955?

A. 59.9 per cent.

Q. And for 1956?

A. 60 per cent.

The Court: Pardon me. When you speak of "assets" do you include bonds and real estate mortgages?

Mr. Owens: Yes, your Honor.

The Court: Or are you referring to assets in common stocks alone?

Mr. Owens: No. I believe the witness testified, your Honor, that for the years 1955 through 1958, the percentage in equity securities of the three classes there started at 62.2 per cent in 1955 and rose to 73 per cent in 1958.

I am now bringing out how that equity is divided between interest in Sears stock as a percentage of total assets, sir.

The Court: By "total assets," do you mean all the other assets?

Mr. Owens: Yes, your Honor. Yes.

The Court: Very well.

[fol. 697] By Mr. Owens:

Q. Would you state the percentages of the total book value that Sears stock has comprised for the year 1955?

Mr. Bushby: I object. That has not the slightest bearing on this case, your Honor.

Mr. Owens: If your Honor please, I am eliciting this testimony for the purpose of showing that the amount of the fund that has been invested, the percentage of the fund that has been invested in equity securities other than Sears has steadily increased, your Honor.

Mr. Cox: Isn't this just a matter, may it please the Court, of arithmetic from the face of the exhibit?

I would like to move the thing along. We are just making computations from the basis of an exhibit, and I wonder whether it is necessary.

Mr. Bushby: Your other witness is here now.

By Mr. Owens:

Q. Would you state what the per cent of the equities at book value is to total value for the year 1955, sir?

A. For Sears stock? 59.9 per cent.

Q. And for 1956?

A. 60 per cent.

Q. And for 1957?

A. 59.75 per cent.

Q. And for 1958?

A. 58.4 per cent.

Q. And would you give us those same figures for the same years, from 1955 to 1958, on the percentage of total assets of the fund that are invested in other equity securities?

A. In 1955, 2.3; in 1956, 1.7; 1957, 9.36; 1958, 14.6.

Q. That shows, does it not, a steady increase in the percentage of other equity securities, as a percentage of the total assets of the fund at book value?

A. Yes, sir.

Q. Now, have you made similar computations for the [fol. 698] percentage of other equity securities as the percentage of the fund at market value?

A. Yes, sir.

Q. And would you give us those figures for the years 1955 to 1958, sir?

A. For other securities, not including Sears, 1955, 1.8; 1956, 1.3; 1957, 6.6; 1958, 10.6.

Q. Do you have a figure, sir, on the income of the fund from the three sources you have mentioned—deposits, contributions, and dividends, and interest, for the year 1949?

A. 1949 it was approximately 42 million dollars, sir.

Q. And for the year 1958?

A. Approximately 100 million.

Mr. Bushby: Is that net?

Mr. Owens: That is income to the fund; that is not net.

By Mr. Owens:

Q. Now, do you have the net growth of the fund at book value for the years 1956 and 1957?

A. The net growth in the assets, at cost, is 54 million, approximately.

Q. Do you know what the net increase in other equity securities was at book value during that period?

A. Including Sears stock, 74 million.

Q. What was the net gross for '57-'58, sir?

A. Fifty-six million, approximately.

Q. And the total increase in equity at book value?

A. 63 million, including Sears stock.

Q. Would you tell us if you are acquainted with any modification of the investment policy that took place in the year 1957, sir?

A. The trustees at that time established a policy whereby investments might be made in equity securities other than Sears stock.

[fol. 699] Q. Did they make a policy determination whether a larger portion of the income or growth would go into equities at that time?

A. A larger growth in prior years?

Q. A larger percentage of the net income being devoted to investment in equities as distinguished from fixed interest-bearing obligations?

A. Yes, sir.

Q. What was that change?

A. To convert some of the more fixed type of investments to equity type investments.

Mr. Owens: I will ask the Reporter to mark this document, entitled, "Savings and Profit-Sharing Pension Fund of Sears Roebuck & Company Employees, Summary of Sears Stock Purchased 1949 through 1958", as Government Exhibit No. 169.

(Thereupon said document was marked Government Exhibit 169, for identification.)

By Mr. Owens:

Q. Do you have a copy of that document, sir?

A. Yes, sir.

Q. Was that document prepared from the business records in your custody and under your supervision?

A. Yes, sir.

Q. Does it accurately reflect the purchase of Sears stock during the period 1949 through 1958?

A. Yes, sir.

Q. Does it reflect, then, the net amount of purchases and the amount of assets of the funds that are going into investment in Sears stock?

A. Yes, sir.

Mr. Owens, I offer this exhibit into evidence, your Honor.

Mr. Bushby: I object. It has absolutely nothing to do [fol. 700] with this case at all, the investment of this fund in Sears Roebuck stock.

Mr. Burnham: We certainly join in the objection.

The Court: Sustained. How much is invested in Sears stock doesn't have anything to do with this case.

Mr. Owens: It shows the leveling off of interest in Sears stock as distinguished from other equities.

The Court: But as to the importance of other equity investments, it hasn't any evidentiary value.

Mr. Owens: All right. Is there any cross examination?

Cross-examination.

By Mr. Gribbon:

Q. Mr. Morgan, when did you say the Sears fund came into operation?

A. 1916, sir.

Q. Did I understand you to say that its first purchase of equities other than Sears took place in 1957?

A. No, sir.

Q. This chart would indicate that in 1954 the fund commenced to purchase equities other than Sears?

A. That is right.

Q. Prior to 1954, was there any provision of the plan that prevented the fund from investing in equities other than Sears?

A. No.

Q. They were free to invest in any equities that they wished, General Motors or any other?

A. To the best of my knowledge, yes, sir. The rules and regulations outline the freedom of the trustees in selecting investments for the fund.

Q. But until December 31, 1953, the trustees deliberately [fol. 701] selected to invest in Sears equities rather than other equities?

A. Yes, sir.

Q. Commencing in 1954, a portion of the fund has been invested in equities other than Sears?

A. Yes, sir.

Q. The final column in the figure under December 31, 1958 for miscellaneous common stock is $85 million, is that correct?

A. Yes, sir.

Q. And $2 million in preferred?

A. Yes, sir.

Q. Of that $85 million that the Sears fund has invested in equities since 1954, how much is in General Motors?

A. None that I know of, sir. None as of 12-31-58, and none that I know of in the years 1954 through 1958.

Q. Do I understand you to mean that ever since 1954 when the fund commenced to invest in equities, nothing has been put into General Motors?

A. Not in General Motors stock.

Q. You are not a member of the investment committee that determines investments, are you?

A. No, sir.

Mr. Gribbon: That is all.

Mr. Bushby: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Metzger: The Government calls as its next witness Mr. Carrol Shanks.

CARROL SHANKS, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Metzger:

Q. Mr. Shanks, would you state for the record your name and business address?

A. My name is Carrol M. Shanks. My business address [fol. 702] is Prudential Insurance Company in Newark, New Jersey.

Q. Mr. Shanks, what is your position with the Prudential Insurance Company?

A. I am president and chief executive officer.

Q. Sir, would you please give us some indication of your professional background?

A. Well, I graduated from college, the University of Washington. I took my law at Columbia, and graduated there. I went to work as a law clerk with the firm of Root, Clark, Buckner & Ballantine.

I worked mainly on financial law there, and taught at Columbia part of the time while I was practicing—the Columbia Law School. I taught at Yale for about two years. I was Associate Professor of Law in the field of corporate finance.

I came back to Root, Clark, and then in 1932 went to the Prudential where, as a lawyer, I was assigned to the Law Department, but my client was the bond department, and I was mainly interested in the reorganization and refinancing of railroads until I got over into the general work of the company.

Q. How long have you been president of the company, sir?

A. Since January, 1946.

Q. Mr. Shanks, are you familiar with the testimony previously adduced in this hearing by Mr. George Johnson?

A. Yes, I have read it over.

Q. What is your opinion of that testimony, sir?

Mr. Cox: I object, your Honor.

The Court: Sustained.

[fol. 703] By Mr. Metzger:

Q. Do you agree with the statements of Mr. Johnson as to the future of the variable annuity concept?

Mr. Cox: I object, your Honor.

I don't believe that is the right way to develop opinion testimony, to ask an expert whether he agrees with somebody else.

Mr. Metzger: I am going to bring out this witness' relationship to the variable annuity concept, sir. I merely want to have that as a starting ground.

The Court: I suggest you rephrase your question.

By Mr. Metzger:

Q. Mr. Shanks, are you familiar with the variable annuity concept?

A. Yes, I am.

Q. Is your company interested in that concept?

A. Yes, very much so. We want the right to issue them and sell them, and we have been seeking legislative enactment in the State of New Jersey which would enable us to do so for about three years or more now.

Q. Do you have reason to believe, sir, that you will soon have this right?

A. Well, I hope that we will have it, but I have been wrong on that before.

Q. Assuming that this legislative authority is granted to your company, granted to the insurance industry in your state to participate in the variable annuity system, would you care, based upon your experience as an executive of this insurance company, to project the future development of the participation of your company and other companies in variable annuities in terms of assets acquired for that purpose?

A. Well, I would be glad to comment on it, although my [fol. 704] estimate as to what assets would be assembled by the sale of variable annuities depends, of course, upon the success of our sales efforts, and what not.

I would say that it would be fairly slow in getting under way because there will certainly be litigation.

Furthermore, although we get authority in one state, there will be many other states where we have to get permission of the commissioners of insurance, or in some states, legislation.

So it will be slow in getting under way.

I would say that we would be doing very well, indeed, if over a period of ten or twelve years we were in a position where the entire industry, which I think, incidentally, will go into the business very shortly after we pave the way on it, were taking in yearly at premiums or dollars toward these variable annuities of as much as a billion and a half to two billion dollars.

Some in our company have said that in a period of ten to fifteen years, the industry might be up to two and a half billion dollars. My guess is, or estimate you might say, that it would be something nearer a billion and a half, and even that will take a lot of doing, a lot of sales training and what not.

Q. In about ten years that would be an annual rate?

A. I should say in ten to fifteen years. It depends how fast we go.

Q. But the rate you are speaking of, sir, is an annual rate?

A. I am speaking of an annual rate, yes.

Q. What percentage, sir, of these assets acquired each year would you anticipate would be applied to equity [fol. 705] securities?

A. I was speaking of the amount that would go to equity securities. As a matter of underwriting and selling them, we would insist—and it is so required in the Act—that they have fixed dollar income which they are working toward and planning for equal to that of the amount of the variable annuity part; but I am speaking now of the sale of the variable annuity part.

Q. Then, sir, you are speaking of 100 per cent of a billion and a half?

A. That is right.

Q. This is aside from your present commitment to equities?

A. Well, that is all aside from our present commitment in equities.

Q. Mr. Shanks, are you familiar with the basic outlines of the plan proposed by the Government, and the plan proposed by du Pont for disposition of this action?

A. I believe I am basically in general terms.

Q. Assuming that the Government plan was adopted by this Court, do you anticipate that the Prudential Insurance Company would sell its present shares of du Pont stock?

A. Well, everything is subject to change, but I would say, as I see it at this moment, I would doubt very much if we would sell the stock. We are long-term investors, very long-term investors, and unless we saw that there was going to be some definite change in the earning power, the prospects and the management of that company, I doubt if we would sell.

I think we would certainly sit tight, though, without buying any more for some time until we saw where the dust fell.

Mr. Metzger: No further questions, your Honor.

[fol. 706] Cross-examination.

By Mr. Bushby:

Q. Your company, the Prudential, Mr. Shanks, also owns shares of General Motors stock at this time?

A. Yes, we do.

Q. And that would be about a hundred thousand shares? Would that be about right?

A. Yes, we have a hundred thousand shares.

Q. What would be your action with regard to those shares in case the proposed Government decree was put into effect?

A. Well, there again I cannot judge in advance what action the Finance Committee might take, but I would say we would probably just sit tight with them.

In other words, they have all been bought well below the present market, and I think we would sit tight with no inclination to buy any more until we saw what happened.

Q. Mr. Shanks, you spoke of this variable annuity concept and your effort on behalf of Prudential to get legislative authority to go into the field.

Now, if you get that authority, that does not mean that variable annuity structure comes into Prudential Insurance Company, does it? Doesn't it mean that these variable annuity assets will be separate and apart from the assets of the insurance company?

A. The essence of the legislation is that we may have a segregated account. It is within the insurance company, but it is a segregated account, and that segregated account operates as an account apart from the investments of the rest of the company.

Q. And committed to these variable annuity contracts but not to your other contracts?

A. That is right.

Q. Yes. I just wanted to get straight what this animal was, what it looked like.

A. That is right.

[fol. 707] Q. You said that the industry might achieve a volume, if you get permission to go ahead, in ten or fifteen years of a billion and a half?

A. That is right.

Q. Cash intake a year?

A. That is right, or even more. I think a billion and a half would be quite a large sum.

Q. Now, as that money comes in, I take it that you would follow a policy of diversification in your purchasing of equities?

A. That is right.

Q. And you would purchase no great percentage or use no great percentage of that sum for any one stock?

A. That is right.

Q. That is your policy at the present with such equities as you do buy in the insurance company?

A. That is right.

Q. Let me stop there a minute and go back to the insurance company.

Do you know how many shares of du Pont the insurance company now holds approximately?

A. I think it is about 18,800, or thereabouts.

Q. That is as I understand it. Now, do you know whether you have bought du Pont shares every year for the last eight or nine years?

A. No, we haven't but we have bought them in five or six of those years. We sold some in '56; we bought some in '57, and I believe that was the last purchase.

Q. Now, as to General Motors, has the company uniformly bought General Motors shares every year since 1950?

A. Well, I believe we have missed a few years but we have bought them fairly uniformly.

The last we bought was in '58.

Q. Now, this variable annuity income, that is, the purchases of variable annuities, they will be limited, will they [fol. 708] not, in the case of each individual customer of the insurance company in relation to his ownership of real annuities?

A. Oh, yes. He will have to have prospects either through Social Security or the proceeds of insurance policies or fixed dollar annuities of some sort, so that half of his income on retirement will be fixed dollar income.

Q. Your agents aren't going around the country just selling anybody as much variable annuities as they will take?

A. Oh, no, not indeed.

Q. That is the concept throughout the industry?

A. That is right.

Q. Now, this money that comes in won't all be new investment money in the investment market, will it, Mr. Shanks?

A. No, you cannot say that it will all be new. I think it will be like any new—somewhat new way of saving. Some will be new but some of it, or a lot of it, will be diverted from other channels of saving one way or another.

I would say that a part would be new, just like I think any new saving device generates some new savings, but only a part.

Q. But some of it will go into variable annuities instead of into mutual investment funds, for example?

A. I think so, yes.

Q. And some will go into variable annuities instead of ordinary orders through brokers in the stock market?

A. I would say so, yes.

Q. And some of it would detract from the money that would otherwise go into regular life insurance policies?

A. I think it may have some effect. They would buy it instead of an endowment policy of some sort.

[fol. 709] Q. And it would be taken from money that would otherwise go into stock exchange monthly purchase plans?

A. I would think so, yes.

Q. And some of it would detract from the money going into straight annuities?

A. Oh, yes, quite a bit of that.

Q. And even the money going into savings accounts in savings banks?

A. Yes, I think there would be some if you could trace it from every known form of saving, but there would also, I think, be some new money brought forth.

Q. Now, will the life insurance company itself ever put, as far as you can see, any large portion of its assets into equities, as contrasted with bonds and debt securities?

A. Well, that depends a little, of course, upon our future in this country and whether we have so-called creeping inflation or something more than creeping inflation. I would say, as I see it now, that it will be a long time indeed before the insurance industry gets as much as ten per cent of its assets in equities.

I think that will be quite a long time indeed. Then even when that happens to them, why, I suspect you will find many companies that have quite a bit less than that.

You see, our business is built up on paying on a dollar basis; we take in a dollar; we pay out a dollar. It is based upon fixed dollar investments.

Q. In fact, in 1958 wouldn't you say that your sales of equity securities were probably greater than your purchases?

A. They came out just about the same. I looked that up. We bought forty-five million three, and we sold forty-five million six or seven.

Q. Coming now to debt financing by industrials in this [fol. 710] country, you are quite familiar with that operation, I know, in your position?

A. Yes.

Q. Would your company give an industrial concern debt financing year after year without that company securing equity financing?

A. I will have to speak in general terms. I will say no. There comes a point when you have to have an equity put in and it comes up continually with us whereby we say, "Well, we will be glad to make this loan except you have to put in as equity X-dollars before me make it."

I will say that as a general practice, the company cannot go very often to the till for borrowing without putting in equity money.

Q. Now, if this proposed Government decree becomes effective, would that hamper equity financing by the General Motors Corporation, in your opinion?

A. Well, if there is a provision in the decree that all of this stops while they do their equity financing, then—I would say that unless there is a provision for the stopping of the sales and the distribution of these shares that in my estimation it will pretty well keep General Motors from doing equity financing in new sales of stock.

Q. Did your company buy any of the Ford offering by the Ford Foundation?

A. No, we did not.

Mr. Bushby: That is all the questions I have.

Mr. Cox: I have a few.

Cross-examination—(Continued)

By Mr. Cox:

Q. Mr. Shanks, in your direct examination you were asked by Mr. Metzger a question about what in your opinion the Prudential Company would do in respect to its du Pont

[fol. 711] holdings if the Government proposal now before the Court should be adopted by the Court.

I believe that in answer to that question you indicated that Prudential did own some shares of du Pont; that you then told Mr. Bushby that Prudential owns about eighteen thousand, some odd shares of du Pont stock; is that right?

A. That is right.

Q. Mr. Shanks, under the Government proposal, to which Mr. Metzger referred in his questions, four thousand three hundred eighty-one thousand odd shares of General Motors are to be distributed annually by a trustee pro rata——.

Mr. Tierney: Million.

By Mr. Cox:

Q. (Continuing)—million. I am sorry. Million shares—are to be distributed annually by a trustee pro rata to the stockholders of du Pont Company.

Now, while you were testifying I made a rough computation and I believe that that would mean in the case of Prudential that it would receive roughly about 2,600 shares each year in the 10-year period by way of distribution.

I will ask you for the purposes of this question to accept that computation.

A. Very well. I will accept it.

Q. Would the Prudential Company be taxed upon receipt of those shares, do you know?

A. Well, as I understand it, the Internal Revenue Bureau has ruled that this is regular income, and if that is the case, and I have not checked that—I do not know about it, but if that is the case we would be taxed upon it just as any other dividend income which we receive.

[fol. 712] Q. Now, would you be taxed at the same rates as an individual would be taxed?

A. No. Under the proposed law, which we are now in the throes—I think I use that word advisedly—of getting a permanent tax law, well, if that is the case, it is involved, because our business is complex and involved; but we would have a 52 per cent tax upon the taxable amount of our investment income and that is the rate.

Now, of course, an individual might well go to 91 per cent.

I think I ought to say we also have the regular 85 per cent intercorporate dividend credit, and the pro rata part

of that over and above the amount which goes into reserves, we would also get that.

Q. 52 per cent would not be the ultimate rate of tax?

A. It might be somewhat less than that because of this credit.

Q. When Prudential made its investment in the stock of the du Pont Company, do you know if it regarded the du Pont stockholdings in General Motors as a capital asset of the du Pont Company?

A. Yes, I am sure we did.

Q. So on these distributions, in economic fact you will be getting a retirement of a capital asset or a distribution of a capital asset?

Mr. Metzger: I object, your Honor. That calls for a legal conclusion.

Mr. Cox: I am asking for an economic conclusion.

Mr. Metzger: What is a capital asset is a matter of law and not a fact question.

The Court: Overruled.

[fol. 713] By the Witness:

A. We regard generally, with du Pont holding this stock, which is a valuable stock and earning dividends and receiving dividends every day, it is an earning capital asset in my estimate, speaking as an economist, and if they distribute that to us, why, we have received that capital asset from them.

To that extent I suppose it is a liquidation of the capital assets of the du Pont Company.

Q. But under the tax law of which we were speaking, as it has been interpreted, and we accept that interpretation of the Internal Revenue Service, a tax is imposed upon the retirement of this capital asset?

A. Assuming all the assumptions which you said, that would be right, yes.

Q. In an economic sense, whatever may be the law, it is a capital levy, Mr. Shanks?

A. I would rather not define it, but I will call it a capital asset of du Pont, and if they give it to us, then we have received that capital asset.

Q. And they are taking part of the assets away from you in the form of taxes at the same time?

A. Well, I suppose if it is taxed, to the extent that it is taxed.

Q. Mr. Shanks, you are here today under subpoena to testify on behalf of the Government. I assume you are under subpoena?

A. Oh, yes. I am not a volunteer, by any means.

Q. And Mr. Metzger has asked you a question about what you would do if the Government plan were adopted?

A. Yes.

Q. I would like to ask you a question just to clear the atmosphere. I am sure Mr. Metzger will join with me in wanting it cleared.

[fol. 714] I take it that you are not here today to testify in support of the plan which the Government has filed in this court, is that right?

A. No, I am not testifying in support of it and I am not testifying against it.

I was never asked to support it or to testify against it. I am testifying just merely with my honest answers to what I am asked. That is all.

Mr. Cox: All right. Thank you.

Mr. Bushby: May I ask just one question?

Cross-examination.

By Mr. Bushby:

Q. What is the comparative size of the Prudential Insurance Company to other companies in the industry in this country?

A. In the life insurance industry?

Q. Yes.

A. Well, we have assets about fourteen billion, seven hundred million, and that makes us the second largest insurance company.

Mr. Bushby: That is all.